In The
Supreme Court of the United States

October Term, 1979

No. 79- **79-1740**

GERMAIN H. BALL, et al.,

Appellants

vs.

ROLAND W. JAMES, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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In The

Supreme Court of the United States

October Term, 1979

No. 79-

GERMAIN H. BALL, ALEX M. CONOVALOFF, BILL ROUSSEAU, LEO C. SMITH, JOHN M. WILLIAMS, THOMAS P. HURLEY, JR., WILLIAM P. SCHRADER, JOHN S. HOOPES, W. LARKIN FITCH, and THOMAS J. FINLEY, in their capacity as members of the Board of Directors, Salt River Project Agricultural Improvement and Power District, and KARL F ABEL, in his capacity as President of the Salt River Project Agricultural Improvement and Power District,

Appellants,

vs.

ROLAND W. JAMES, JAMES R. FITZSIMMONS, DWIGHT M. BRAHS, FRANK SACCO, and JOHN H. MAFFEO, on behalf of themselves and their respective classes,

Appellees.

JURISDICTIONAL STATEMENT

Appellants Germain H. Ball, et al., members of the Board of Directors of the Salt River Project Agricultural Improvement and Power District, appeal from the judgment and opinion of the United States Court of Appeals for the Ninth Circuit of October 12, 1979, declaring unconstitutional the acreage voting system of the District.

OPINION BELOW

The opinion of the Court of Appeals (App. A) is reported at 613 F.2d 180.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on October 12, 1979. The motion for rehearing, timely filed, was denied on February 6, 1980. A notice of appeal to this Court was filed on February 13, 1980 (App. F). Jurisdiction is conferred on this Court by 28 U.S.C. 1254(2).

QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), the test for determining the constitutionality of special district elections continues to turn on the nature of the district's functions and the disproportionate effect of its activities on landowners as a group, or whether the test now depends on subjective judicial assessment of the size of the district and the number of its customers.

2. Whether the Constitution entitles electric customers to proprietary and voting control of a water reclamation district that sells electricity to support reclamation but whose powers, functions, and relationships between entrepreneurial risk and voting control differ in no material way from those of a privately owned electric utility.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Arizona Revised Statutes §§ 45-909 and 45-983 provide as follows:

§ 45-909. Qualifications of electors

No person shall be entitled to vote at any election held under the provisions of this chapter unless he possesses all the qualifications required of electors for state officers under the general election laws, and is the owner of record of real property located within the boundaries of the district as of sixty days preceding a district election, and on which he has been assessed for county taxes as shown by the county tax roll next preceding the date of the election.

§ 45-983. Acreage system of voting

A. The petition for organization of the district may provide that each owner of land shall have one vote, or may provide for voting on an acreage basis.

B. Except as provided in § 45-965, subsection D, if the district is or has been organized under a provision for voting on an acreage basis, each landowner possessing the qualifications of an elector shall be entitled to cast one vote at all elections after the organization election on each office to be filled, or each question submitted, for each acre of land within the district owned by him.

C. Except as provided in § 45-965, subsection D, from and after the effective date of this act each landowner possessing the qualifications of an elector who owns less than one acre of land within the district shall be entitled to a fractional vote on each office to be filled or each question submitted. The fractional vote shall be equal to the fraction of an acre owned by such elector.

D. If land is held in more than one name, each owner otherwise possessing the qualifications of an elector may vote the number of acres or fractions thereof represented by his legal interest or proportionate share of and in the lands.

E. The result of each election shall be determined by a majority of the acres voted as provided in subsections B, C and D of this section.

F. The district shall maintain a record of the persons owning real property within the boundaries of the district as such ownership appears on the records of the county recorder and the number of votes or fractions thereof the owner thereof shall be entitled to vote.

STATEMENT OF THE CASE

Nature of the Case.

This appeal involves the constitutionality of the acreage-based election procedures of one of the nation's oldest and largest federal reclamation projects. The District Court held

these procedures constitutional, and the Court of Appeals in a divided opinion held them unconstitutional. Judged by any standard, this is the most important case involving the constitutionality of special district voting procedures since the landmark voting rights decision in *Reynolds v. Sims*, 377 U.S. 533 (1964).

The Salt River Project stores and delivers untreated water to the owners of the water. Those owners are the landholders of 236,000 acres located in Central Arizona, including much of what is now the Phoenix metropolitan area. Over the 77 years of its existence, the primary purpose of the Salt River Project has been the storage, conservation, and delivery of water. In addition, "following the longstanding reclamation principle, electric revenues . . . are used to support water and irrigation operations, thereby keeping water delivery charges at reasonable levels. At the same time, the [Project] maintains rates for the electric service it provides which are comparable to those of neighboring utilities."[1]

Since it is a federal reclamation project, title to many of the Salt River Project properties is vested in the United States. In addition, the Secretary of the Interior has comprehensive supervisory powers over it. Since 1917, however, the Project management has been the responsibility of either the Salt River Valley Water Users Association (Association) or, since 1937, the joint responsibility of the Association and the Salt River Project Agricultural Improvement and Power District (District). The Association is a private corporation organized under the laws of the Terri-

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[1] Stipulated Statement of Facts, Exhibit K, p. 4. The Stipulated Statement of Facts (Facts) is reproduced as Appendix C to this Jurisdictional Statement. The balance of the Record consists of Exhibits A-Z to the Stipulated Statement of Facts.

tory of Arizona, and the District is an agricultural improvement district, a special district which is a political subdivision of the State of Arizona. It is the Board of Directors of the District whose election is at issue here.

Historical Background.

The constitutional supports for the District's landowner based voting system are grounded generally in federal reclamation law and history and more particularly in the history of irrigation and reclamation in the Salt River Valley.

Agricultural development of the Valley began in the 1860's. A fertile but arid land whose usefulness has always depended on an adequate water supply, its development reached a barrier by the turn of the century. The farmers of the Valley, who were attempting to irrigate approximately 150,000 acres of land by diverting water from the Salt River through canals, were unable to control the erratic flow of the River. A long drought in the 1890's had significantly reduced the River's flow. At other times recurring floods washed out brush diversion dams, interrupting delivery of water to the lands to which it had been appropriated. It was apparent that cooperative action to store the waters of the Salt River and to insure a dependable supply of water for agriculture was necessary to further development of the Valley.[2]

In 1895, some farmers in the Salt River Valley formed the "Farmers Protective Association", for the prime purpose of securing legislation favorable to their interests. Salt River Valley farmers were in fact instrumental in securing the passage of the Reclamation Act of 1902, 43 U.S.C. 371

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[2] See Facts ¶ 5, App. C-4-5. The Court's opinion in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), authored by Mr. Justice Rehnquist, recounted in detail the "peculiar problems of adequate water supplies" in the Western part of the country which led to the creation of special purpose water districts. 410 U.S. at 721-23. The discussion is pertinent to this case as well.

et seq. (Facts ¶ 5, App. C-4-5). Under that Act, the United States advanced interest-free funds to purchase and construct integrated systems of reclamation works, to be repaid by the owners of the lands benefited.

The Salt River Project, authorized by the Secretary of the Interior on March 14, 1903, was the second reclamation project created under the 1902 Act.

The potential for generating and selling hydroelectric power in connection with reclamation projects led Congress in 1906 to authorize sale of power "wherever . . . an opportunity is afforded for the development of power under any project". 43 U.S.C. 522. Almost from its beginning, the Salt River Project has generated and sold electric power incident to and in support of its primary water activities. (Facts ¶¶ 12 and 17, App. C-7,8).

The Salt River Valley Water Users Association was formed in 1903, as the legal entity that could satisfy the requirement of the 1902 Act that Project water users repay to the United States the costs of constructing and augmenting reclamation projects. The Association's Articles of Incorporation were drafted in cooperation with officers of the Federal Reclamation Service. The Articles give the subscribed lands the right to delivery of water in proportion to acreage. They further authorize acreage-proportionate stock assessments to meet the Association's income needs. Those stock assessments become a lien on the subscribed lands until paid. The Articles also provide for ownership and corporate voting rights in proportion to acreage subscribed into Association membership. (Facts ¶ 8, App. C-5, and Exhibit A to Facts).

In 1917, the Association and the United States entered into a contract obligating the Association to operate and maintain the Project as agent for the Government. (Exhibit C to Facts). The agreement requires the Association to maintain all works in proper operating condition and to deliver water to those entitled to it. (Exhibit C, ¶ 3 to Facts). It may return the Project to the United States for any rea-

son on March 1 of any year upon one year's notice. The United States may resume operation of the Project should the Association fail to carry out the law or the terms of the contract. (*Id.* ¶ 19).

The Association operated the Project directly from 1917 to 1937. In the 1920's and early 1930's, the Association heavily encumbered shareholders' lands to construct major dams and other works in the Project. (Facts ¶¶ 13, 14, App. C-7). During the Depression, the Association faced the need to reduce its borrowing costs. Creation of a special district which could issue bonds, the interest on which would be free from income taxation, seemed to provide the solution. Arizona's Agricultural Improvement District Act of 1928 permitted the creation of special districts known as agricultural improvement districts within federal reclamation projects for the purpose of developing and delivering water to the lands of the district. Since an agricultural improvement district is a political subdivision of the State of Arizona, the interest on its bonds is exempt from federal income tax. Notwithstanding the tax and consequent bond-marketing advantages, many of the Association's shareholders objected to a proposal to form an agricultural improvement district as the vehicle for raising needed capital funds. One of the reasons was that under the 1928 Act voting for a district's Board of Directors would be per capita among landowners, rather than by acreage as in the Association. (Facts ¶ 21, App. C-9-10). This would have meant that the landowners would bear the risk of bringing the District into existence without voting control proportionate to their risk. Representatives of the Association, therefore, requested the Arizona Legislature to amend the Agricultural Improvement District Act to conform the voting system of the Act to that of the Association. The Legislature enacted the necessary amendments in 1936, and the District was created in 1937, with boundaries essentially identical to the lands which had been subscribed into Association membership. Without acreage voting the Association would not have transferred title to its property

and control of the Project to the District. (Facts ¶ 33, App. C-14). Therefore, absent acreage voting, there would have been no District.

Under an agreement entered into in 1937 and approved by the United States, the Association transferred to the District, subject to the paramount interest of the United States, its property rights and duties, and authorized the District to perform the Association's contract obligations. Facts ¶¶ 24 and 32, App. 11,14). The Association in turn agreed to continue to operate and maintain the Salt River Project on behalf of the District. (Facts ¶ 24, App. C-11). As amended in 1944 and 1949, the contract now provides that the District itself directly operate the power and water storage function, and the Association operates the water delivery system as agent for the District. The net result is that since 1949 the District has operated the power activities and, through its agent the Association, the water activities.[3]

All of these activities of both the Association and the District are carried out against the background of the stipulated fact that the primary purpose of the Salt River Project is the development, storage and distribution of water for the irrigation of arid and semi-arid lands. (Facts ¶ 16, App. C-7-8). The development and sale of electrical power was undertaken not for the primary purpose of providing electricity to the public, but rather to provide financial support to the Project's primary irrigation functions. (Facts ¶ 17, App. C-8).

District Organization and Voting.

Originally, the method of electing the District's governing body — its Board of Directors — was the same as that used by the Association: one vote per acre. There have been two subsequent changes. In 1969, the Arizona Legislature amended the Agricultural Improvement District Act to permit the owners of less than one acre to cast a fractional

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[3] The historical explanation for this arrangement is set forth in the Facts ¶ 25, App. C-11-12.

vote, proportionate to their acreage. The practical effect of this change was to enfranchise medium and small landowners. The second change occurred in 1976, after entry of the District Court's judgment holding the election statutes constitutional. Prior to the 1976 amendment, each of the ten directors was elected from a designated geographic electoral division. Each of the electoral divisions has as nearly equal number of acres as practicable. A.R.S. §45-961A2 (1956). The Legislature in 1976 enlarged the Board to 14 and provided that the four additional members were to be elected at large, with each landowner in the district having one vote.[4] In addition to its 14 Board members, the District also has a President and Vice President who are elected at large on an acreage basis. (Facts ¶ 26, App. C-12).

The District and the Association have identical constituencies, identical purposes, identical management, and essentially identical boundaries. (Facts ¶ 31, App. C-13). The Arizona Supreme Court has stated that the relationship between the two is one of "alter egos in substance, though not in law." (Facts ¶ 23, App. C-10-11).

Water and Power Functions.

Applying power revenues to reduce water costs is a long-standing reclamation principle. (See 43 U.S.C. 485(c), 522, 598, 501, and 825t. See also Exhibit K to Facts, p. 4.) The Salt River Project is no exception. Over the last ten years, an average of $10 million dollars per year from the District's power revenues has been applied to reduce water costs.

There is no question, however — indeed the parties have stipulated to the fact — that "the development and sale of electrical power ... was undertaken not for the primary purpose of providing electricity to the public but to support the primary irrigation functions by supplying power for re-

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[4] Ariz. Rev. Stat. Ann. §45-961 B (1979 Supp.), added by Ariz. Laws 1976, Ch. 83, §2; Ariz. Rev. Stat. Ann. §45-963 (1979 Supp.), as amended, Ariz. Laws 1976, Ch. 83, §3; and Ariz. Rev. Stat. Ann. §45-983 (1979 Supp.), as amended, Ariz. Laws 1976, Ch. 83, §6.

clamation uses and by producing revenues which could be applied to increase the amount and reduce the cost of water to Association subscribed lands." (Facts ¶ 17, App. C-8).[5]

Water Functions.

The District and the Association service the water rights of more than 236,000 acres of assessed land through a system of six reservoirs with 2,072,050 acre-feet storage capacity, 131 miles of canals, 875 miles of laterals, and 263 miles of drainage or waste ditches. (Facts ¶ 44, App. C-19).

Though large in size, the Project's water functions are narrow in scope. They are not analogous to the municipal water functions of a city. The District and the Association own no water. They do not buy or sell water. They do not treat water. The Project only stores water behind its dams, minimizes water loss (through conservation practices), and then delivers water through the Project canals to those landowners who own it.[6] Therefore, the District and Association are not in the "water business" in the same sense that a city or municipal water company might be in the water business. Their stewardship is over a federal rec-

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[5] The Arizona Supreme Court observed in *Uhlmann v. Wren*, 97 Ariz. 366, 392, 401 P.2d 113, 124 (1965), that the District's power activities could only be "an incidental phase of reclamation, not a primary or independent end in itself," because the only reason for sale of power is "the use of power revenue to support its primary irrigation and reclamation functions."

[6] The amount of water to which any landowner is entitled consists of two basic components, normal flow and stored and developed waters. Under Arizona law, all surface water rights are appurtenant to the land. Rights to the normal flow of the river are determined according to the time priority by which the river's waters were beneficially applied to the land. (See Facts ¶ 39, App. C-16, and the Kent Decree referred to therein). Rights to stored and developed waters (above the normal flow of the river) are divided equally on an acreage basis among all Association-subscribed land. (Facts ¶¶ 39 and 40, App. C-16-17). Thus, normal flow water rights are approximately proportionate to acreage, and stored and developed water rights are exactly proportionate to acreage.

lamation project. The Project merely stores, conserves, and delivers water that belongs to other people.

Approximately 75% of the water delivered by the District is used by its owners for agricultural and other irrigation purposes. Included in that 75% is about 15% used for "nonagricultural but predominantly irrigation uses, including parks, playgrounds, schools, and subdivision irrigation." (Facts ¶ 74, App. C-31). The other 25% is delivered to municipalities. The water delivered to municipalities represents either water appurtenant to land owned by the cities or water appurtenant to land owned by individuals who have chosen not to take delivery directly from the Project and have allowed the cities to take delivery as their agents. The agency contract between the Association and the city involved (there are 8 such cities; see Facts ¶¶ 41, 42, 75, and 82, App. C-17-18, 31, 33) provides that the city pays on behalf of those landowners the same assessments and water charges that those landowners would pay if they elected to take their water deliveries directly from the Project. Landowners who allow the cities to take delivery of their water may revoke their consent and resume taking their water themselves at any time.

The lower court's assertion that "nearly 40% of the water delivered by the District is used and paid for in a manner unrelated to agriculture or land ownership" (App. A-6) is something of a mystery. To the extent this assertion implies that the entitlement to water delivered to the cities or used for nonagricultural irrigation purposes is tied to anything other than land ownership, or that the amounts that the District charges for delivery of this water differs from its charges for agriculture water deliveries, the statement is false. (See Facts ¶ 41, App. C-17). The Court of Appeals' mistaken view on this factual issue was apparently important to its holding, because the opinion later states: "In view of the magnitude of the electric utility operations and the large percentage of the water services which are used

and paid for in a manner unrelated to land ownership, it would elevate form over substance to characterize the District as functioning solely for the benefit of landowners." (App. A-7).

The Court of Appeals' statement that "the District is not concerned solely with providing water for agriculture" (App. A-6) is correct but irrelevant. The District delivers water to persons and entities who own it and are entitled to receive it. The entitlement to the water and the amount of the entitlement depend exclusively on land ownership. (Facts ¶ 40, App. C-17). The use to which this water is placed once it is delivered to its owners is of no concern to the District and has no relevance to the District's obligation to store and deliver water to cities, either in their own right or as agents. The fact that the cities treat and sell water does not enlarge the limited nature of the District's function.

Power Functions.

The District is the second largest supplier of electricity in the State of Arizona, serving some 240,000 customers. (Facts ¶ 46, App. C-19). The largest and third largest, Arizona Public Service Co. and Tucson Electric Power Co., are both privately owned utilities. (Exhibit K to Facts, p. 30).

The District's power activities are, in effect, a business venture of the landowners to reduce the cost of water deliveries. (Facts ¶ 34, App. C-14). In a case involving the Salt River Project, the Arizona Supreme Court quoted from earlier decisions describing Arizona's irrigation districts and similar special districts as "purely business and economic and not political and governmental." *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District,* 78 Ariz. 30, 42-43, 275 P.2d 393, 402 (1954). Viewed as a percentage of gross power revenues, the amount of District power revenues provided for water assistance is approximately equivalent to the dividends paid to common stockholders in comparable electric utilities. (Facts ¶ 56, App. C-23). Its electric rates are also compara-

ble to those of the State's two principal private electric utilities. (Exhibit K to Facts, pp. 4-30;, Exhibit L to Facts, p. 1). In 1975, the year immediately preceding the Stipulation in this case, the agricultural water subsidy amounted to $8.89 per power customer. (Facts ¶ 84, App. C-33).

Just as the private investor puts his money at risk only because of anticipated profits, "the Association and its member landowners would not have transferred title to its property and control of the Salt River Project, including the power system, to a public body governed under a voting system without acreage voting and open to all qualified state electors solely on the basis of residence on District land." (Facts ¶ 33, App. C-14).

Labels aside, the only functional difference between the Salt River Project and private, investor-owned utilities in the State of Arizona is the District's power to impose an "acreage tax."[7] This acreage tax applies only to member lands and is simply the mirror-image of the stock assessment power to which those lands were already subject by virtue of Association membership. It has never been imposed, and probably never will be, because the Association has contracted to levy an acreage assessment under the Association's corporate stock assessment power at any time the District might otherwise require tax revenues to meet its current expenditures. The Association has levied acreage assessments for the benefit of the District under this contract provision. (Facts ¶ 18, App. C-8).

Moreover, if the acreage tax were ever imposed, it would be on a per acre rather than an *ad valorem* basis. Aside from that distinction that exists in law but has never been exercised in fact, the electric functions of the District are identical to those of private electric utilities in Arizona. The District cannot impose sales taxes or *ad valorem* property taxes. It cannot enact laws regulating the conduct of citizens residing within its boundaries. It has no authority to impose punishments for violations of any laws or regula-

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[7] Ariz. Rev. Stat. Ann. §45-1011, *et. seq.* (1956).

tions. The District has the power of eminent domain, but so do other private utilities in the State of Arizona. Ariz. Rev. Stat. Ann. §12-1111 (1956). And, unlike all general purpose political subdivisions—indeed, unlike any other political subdivision in the State—the District is subject to *ad valorem* contributions in lieu of taxes on its property. Through the payment of these in lieu contributions, the District's electric operations are "in substance . . . taxed by the State like any other privately-owned utility." (Facts ¶¶ 57 and 58, App. C-23). The Arizona Supreme Court has repeatedly held, and has reiterated as recently as 1979 in *Neidner v. Salt River Project Agricultural Improvement & Power District*, 121 Ariz. 331, 590 P.2d 447, that the District is essentially a private business venture with no public powers of any significance.

In short, therefore, the Salt River Project was brought into existence over three quarters of a century ago because landowners in the Salt River Valley were willing to put their lands at risk in anticipation of enhancement of the value of those lands because of the Project's water storage and delivery activities. Almost from the beginning, the water operations have benefited from subsidies provided by the sale of electricity. This has been accomplished through electric rates competitive with those of private utilities, and the return to the landowners has been comparable to the return that would have been realized by private utility shareholders. The only difference is that the Arizona Legislature has adopted and periodically modified statutes allowing landowners to create special districts through which this conservation of agricultural water is subsidized. As with any other business enterprise, the beneficiaries are the people whose assets made the venture possible.

The Proceedings Below.

This lawsuit was brought by persons living within the District as a challenge to the constitutionality of the statutes by which the District's directors are elected. On cross motions for summary judgment on stipulated facts the Dis-

trict Court held the statutory scheme constitutional and dismissed the complaint. Nineteen months after oral argument, two members of the Court of Appeals reversed the District Court's judgment. The Court of Appeals majority opinion focuses on the undisputed facts that the District is large and that its activities affect the interests of many people. In the language of the majority, "the size and nature of the projects of the District and the effect of its operations on all of the residents of Arizona are more extensive than those of the district in *Salyer*." (App. A-5). Judge Hall, in dissent, observed that "what the court is holding is essentially that the plaintiffs, solely because they are users, are entitled to participate in all of the benefits as owners in the management and operation of the defendant District." (App. A-11).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL[8]

I.

With its Concentration on Size Rather Than Function the Court of Appeals' New Test for Determining the Constitutionality of Special District Election Procedures Displaces this Court's Holding in Salyer.

Over the decade and a half since its decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has consistently affirmed the principle that its ruling in that case dealing with apportionment—and in other cases dealing with voter qualifications—do not apply to all governmental units. By dictum in *Avery v. Midland County*, 390 U.S. 374 (1968), and *Hadley v. Junior College District*, 397 U.S. 50 (1970), and holdings in *Salyer Land Co. v. Tulare Lake Water Basin Storage District*, 410 U.S. 719 (1973) and *Associated*

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[8] For reasons set forth in this section, the federal questions presented are clearly substantial. There is, therefore, no need for the Court to reach the issue whether 28 U.S.C. 1254(2) requires review regardless of "substantiality." As observed by Wright, Miller, and Cooper:

> The historic analogy to appeals from state courts that gave birth to §1254(2) extends beyond the finality issue to suggest that appeal jurisdiction might be defeated by lack of a substantial question. This possible limitation should be rejected. . . . State court appeals are most likely to be dismissed because a state court has rejected a frivolous attack on a state statute. Appeal lies from a Court of Appeals, on the other hand, only if it has held a state statute invalid. There may be some state statutes that are so transparently invalid that the Supreme Court need not bother with full presentation of arguments. Such cases are apt to be rare. The court can protect itself against them, if they should arise, by summary affirmance rather than by dismissal. Wright, Miller and Cooper, *Federal Practice and Procedure* §4037, p. 39 (1978).

The authors also observe in a footnote that their position is supported by Rule 16's differentiated treatment of motions to dismiss, depending on whether the appeal comes from a state or a federal court. Under Rule 16(1)(b), the motion to dismiss an appeal from a state court may be based on failure to present a substantial federal question. It is less clear that a motion to dismiss an appeal from a federal court of appeals under Rule 16(1) (c) can be sustained on the ground that there is no substantial federal question.

Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 744 (1973), the Court has clarified that the controlling distinction turns on function rather than size, on what the entity does, rather than on how big it is or how many customers it has. Special districts, such as the water conservation operations in *Salyer*, *Associated Enterprise*, and this case, are outside the reach of *Reynolds* and *Kramer v. Union Free School District*, 395 U.S. 621 (1969). Entities exercising general governmental powers, such as cities, counties, and school districts, are not.

The Court of Appeals has drawn a different line, focusing on size rather than function.[9]

The governing constitutional test prescribed by *Salyer* is that the restrictive rules of *Reynolds* and *Kramer* do not apply where (1) the district has a limited purpose and (2) its activities have a disproportionate effect on land owners as a group.

With respect to the limited purpose requirement, the *Salyer* opinion recognized that special districts may engage in several different functions. In the *Salyer* case, one of these functions was flood control. The Court's holding, however, focused on the district's primary purpose: "Its primary purpose, indeed the reason for its existence, is to

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[9] The following quotations from the Court of Appeals opinion are illustrative:

> The case at hand is quite different. Although at one time the Salt River District did bear some similarities to the district in *Salyer*, today the size and nature of the projects of the District and the effect of its operations on all of the residents of Arizona are far more extensive than those of the district in *Salyer*. App. A-5.
>
> The electric utility operations of the district are so substantial in scope and are so closely interwoven with the water delivery functions of the district that it is not a special limited purpose district whose operations have a disproportionate effect on landowners as a class. App. A-9.

provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin." 410 U.S. at 728.

Salyer therefore stands for the principle that a special district's representational scheme may reflect a legislative preference for the primary purpose the district was created to serve, even though other possible purposes (in *Salyer*, flood control) are subordinated. In this case, the "primary purpose, indeed the reason for [the Salt River Project's] existence" is similarly limited. As the parties have stipulated "[t]he primary purpose ... of the Salt River Project ... was for the development, storage and distribution of water for the irrigation of arid and semi-arid lands." (Facts ¶ 16, App. C-7-8).

Neither in *Salyer*, nor in *Associated Enterprises*, nor in any other case has this Court implied that the relevant test turns on size or number of persons affected. The relevant inquiry is an inquiry into function, and the Salt River Project's functions are highly limited. Its primary function is water storage, conservation, and delivery. This function falls far short of a general municipal water service. The Project does not own any water. It does not buy or sell water. It does not even treat water. It simply charges the people who own the water a fee for storing, conserving, and delivering their water to them. Its electric functions are authorized for one purpose and one only, to subsidize its water conservation and delivery functions. The adjunct nature of the Project's electric operations is a fact that the appellees have consistently attempted to avoid. It is a stipulated fact, however, and therefore cannot be avoided. (Facts ¶¶ 16 and 17, App. C-7-8).

The disproportionate effect of the activities of this District on the landowners it serves is also undeniable. The assets necessary for the original creation of the Salt River Project were the lands within the Association boundaries. But for the District's acreage voting, the Association's property and powers would never have been transferred to the

District, and there would be no District. The primary purpose of the District's activities, including the sale of electric power, is to make more effective and less costly the conservation and delivery of water to Association lands. These lands alone provide security for hundreds of millions of dollars of outstanding bonded indebtedness. They also stand as potential security for revenue bond indebtedness because, in the event revenues are insufficient to meet the bond obligations, the District could levy an acreage tax or require the Association to impose an acreage assessment. It is the landowners who ran the risk of the Project's creation, and the landowners who have benefited from it: "the assessed valuation of agricultural lands within the District and the Association is generally twice the assessed valuation of comparable agricultural lands outside the boundaries of the District and the Association." (Facts ¶ 55, App. C-22). And it is the landowners who run the risk that if the Court of Appeals' judgment becomes law, a new board of directors, elected entirely by a customer constituency, could lower electric rates to the point that an acreage assessment by the Association or an acreage tax by the District would have to be imposed. In that event, the owner of a $200,000 city house on a one-third acre lot would not pay the same tax as the owner of a $200,000 50-acre farm. The farm owner would pay exactly 150 times the taxes of the city dweller's property, and the owner of a one-section (640 acre) farm would pay 1,920 times as much. But under the Court of Appeals' decision, all three would exercise the same voting power to set in motion events leading to such a tax or assessment.

It is clear, therefore, that in this case as in *Salyer* the special district at issue exercises a limited range of functions and its activities have a disproportionate effect on landowners as a group. The Court of Appeals' basis for distinguishing *Salyer* is that "the size and nature of the projects of the District and the effect of its operations on all of the residents of Arizona are far more extensive than those of the district in *Salyer*." (App. A-5). This Court has

never suggested that the *Salyer* inquiry should turn on such subjective assessments, and whether this is to be the new test clearly raises a substantial federal question.

Aside from its lack of any supporting precedent or rationale, the Court of Appeals' test is wholly unworkable. If the applicability of *Salyer* is to depend on its size or the number of its customers, how large is too large, and how many customers is too many? The need for stability and predictability on the part of special districts and their constituencies would be thwarted by a constitutional standard dependent upon such elusive and undefinable matters of degree.

In summary, the District comes within the *Salyer* principle that control of special districts undertaken by landowners and with limited activities disproportionately affecting land may be allocated to those landowners. The Ninth Circuit's new rule that special districts otherwise within the *Salyer* principle fall outside it when they become big is unprincipled, unworkable, and wrong. The effect of the Court of Appeals decision is to expropriate the landowners of control of the water system they have built and operated for more than a half century as well as the power system they built to support water improvement. Plainly, the Ninth Circuit's new exception to *Salyer* presents a substantial federal question.

II.

The Salt River Project District Is In Substance a Private Business Entity; Therefore, the Equal Protection Clause Does Not Require Customer Control of It Any More Than for Other Private Businesses.

The whole point of this lawsuit—and the effect of the Court of Appeals' holding—is to change Arizona law dealing with economic, proprietary rights in the Salt River Project by substituting customer control for the present control by

its owners. The question is one of economic policy that belongs to the Arizona Legislature.[10]

The Arizona Supreme Court has held:

> The ultimate parties in interest in both the association and the district are the landowners within the identical boundaries of the association and the district. *Reichenberger v. Salt River Project Agricultural Improvement & Power District*, 50 Ariz. 144, 151, 70 P.2d 452, 455 (1937).

> The public does not own the District. . . . Instead the owners are the private land holders. The profits from the sale of electricity are used to defray the expense in irrigating these private lands for personal profit. The public interest is merely that of consumers of its product, for which they pay. . . . The District does not function to 'serve the whole people' but rather the District operates for the benefit of these 'inhabitants of the district' who are private owners. *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement & Power District*, 78 Ariz. 30, 44, 275 P.2d 393, 402-03 (1954).

Only last year, the Arizona Supreme Court held:

> The District's powers as a political subdivision are

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[10] The strongest case that can be made for Appellees' position is that they are economically affected to the extent of the agricultural water subsidy. In 1975 this amounted to an average of $8.89 per customer. If the District's Board of Directors were under consumer control, electric rates, and therefore the water subsidy, would presumably be reduced. The net effect of the Arizona Legislature's acreage-based board representation, therefore, is a subsidy for water users. Yet it is clear that the Legislature could have directly provided such a subsidy without any constitutional impediment. This Court has consistently held that the states enjoy a broad latitude in granting subsidies and otherwise allocating their scarce resources. See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Ohio Bureau Employment Services v. Hodery*, 431 U.S. 471 (1977); *Mathews v. DeCastro*, 429 U.S. 181 (1976); *Alexander v. Fioto*, 430 U.S. 634 (1977); *Idaho Department of Employment v. Smith*, 434 U.S. 100 (1977); and *County Board of Arlington County v. Richards*, 434 U.S. 5 (1977).

> "limited to the purposes justifying its political existence" and the provisions of Art. 13, §7 do not alter the inherent characteristics of the District as "a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized." *City of Mesa v. Salt River Project Agricultural Improvement and Power District*, 92 Ariz. 91, 97, 103-4, 373 P.2d 722, 726, 731 (1962). Unlike other municipal corporations owned by the public and managed by public officials, the District is owned and managed by private landowners and, although the District supplies services to the public such as electrical power, the profits of its operations are used to defray the expenses of irrigation of private lands of the District landowners. *Neidner v. Salt River Project Agricultural Improvement & Power District*, 121 Ariz. 331, 332, 590 P.2d 447, 448 (1979).

These holdings by the Arizona Supreme Court as to the purposes, priorities, and powers of the District under state law are supposed to be binding on federal courts. *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 488 (1976). The Court of Appeals, however, rejected these Arizona decisions and grounded its invalidation of the state statute in a very different understanding of the District's intended purposes, priorities, and powers:

> The District is a political subdivision of the State of Arizona with the legal status of a municipality. Ariz. Const., art. 13, §7. It is entitled to all the immunities and exemptions granted municipalities. Moreover, the scale of the District's operations simply does not permit the interpretation that the electric utility is a side venture that the District dabbles in to pick up a little extra money in order to benefit the landowners. *The operation of the utility has taken on independent significance.* In view of the magnitude of the electric utility operations and the large percentage of the water

> services which are used and paid for in a manner unrelated to land ownership, it would elevate form over substance to characterize the District as functioning solely for the benefit of landowners. (App. 44, A-7)[11] (Emphasis supplied).

The Court of Appeals has therefore grounded its holding on its view of Arizona law concerning which the Arizona Supreme Court has held otherwise. Since the rulings of the Arizona Supreme Court are controlling on these issues, the Court of Appeals' holdings—like the assumption as to Arizona law upon which it is based—must fall.[12]

The District supplies electricity at retail to electric consumers in Arizona. Arizona Public Service Company and Tucson Electric Power Company also supply electricity to retail consumers in Arizona. The reason that Arizona Public Service and Tucson Electric Power are in the power business is that several decades ago investors were willing to put their property (money) at risk, and to leave it at risk from that time to the present in anticipation of a profit. Profits from the operations of those companies belong to the shareholders, and control is vested in the shareholders. The companies were organized pursuant to the laws of the State of Arizona. They owe their existence to the Arizona corporation laws. It is also Arizona law that guarantees that both the return on capital and the right to elect the board of directors are vested in those who bear the entrepreneurial risk.

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[11] This assertion by the Court of Appeals that the District does not function "solely for the benefit of the landowners" totally misses the point of *Salyer*. The mere benefit to customers of being able to buy a product made possible by the undertakings of the investors is not the kind of interest which carries with it a constitutional entitlement to control the enterprise. 410 U.S. at 430-31.

[12] The Court of Appeals' holding is also in conflict with the Stipulated Statement of Facts ¶ 34, App. C-14.

Similarly, the reason that the Salt River Project is in the power business is that several decades ago property owners put their property at risk and continue to leave it at risk for the hope of a return beneficial to them. It is a stipulated fact that but for acreage voting there would have been no District, because without the protection of acreage voting, the Association's landowners would not have transferred the Association's assets and powers to the District. (Facts ¶ 33, App. C-14).

The reason that Arizona Public Service and Tucson Electric Power were brought into existence was to return a profit to those who bore the risks of the creation and the continuing existence of those companies. The same is true of the Salt River Project. Instead of dividends and stock appreciation, the return is in the form of an agricultural water subsidy. The parties have stipulated that "viewed as a percentage of gross power revenues, the amount of the District power revenues utilized to meet water costs is approximately equivalent to the dividends paid to common stockholders in comparable electric companies." (Facts ¶ 56, App. C-23). The record also discloses that there are no significant differences among the rates charged by Arizona Public Service Company, Salt River Project, and Tucson Electric Power. Finally, while its payments are labeled "voluntary contributions in lieu of property taxes"[13] rather than taxes, "in substance, the electrical facilities of the District are taxed the same as privately owned electrical utility property." (Facts ¶ 57, App. C-23).

Thus, Arizona has provided two statutory schemes by which property owners may put their property at risk in the generation and sale of electricity in anticipation of benefits to themselves. There is no less reason to protect the investment-backed expectations of one set of property owners who place their assets at risk under the agricultural im-

[13] Ariz. Rev. Stat. Ann. §45-2201 *et. seq.* (1979 Supp.).

provement district statutes than to protect the expectations of another set of property owners who placed property at risk under a different set of statutes dealing with stock corporations.

The appellees and the Court of Appeals have emphasized that the activities of the Salt River Project are "important" to the appellees. Of course they are. They are important for the same reasons, and to the same extent, that the activities and the policies of Arizona Public Service and Tucson Electric Power are important to their customers. For those stock corporations, Arizona law provides no departure from the principle that control follows risk. The Constitution does not require different treatment for Salt River Project electric customers. At the very least, a holding that such a distinction lies outside the scope of Arizona's constitutional range of policy choice presents a substantial federal question.

CONCLUSION

The appellants submit that they are entitled to review by this Court as a matter of right.[14] The standard of review under §1254(2) need not be reached in this case, however, because the lower court's modification of the *Salyer* standard clearly presents a substantial federal question.

The *Salyer* test, distinguishing between general governmental units and special districts, is not only theoretically sound; it is also workable because it is keyed to function rather than size. The Ninth Circuit has created an important modification to this test. The net effect of that modification is to change the test itself. The Court of Appeals has created an exception to *Salyer* where in the Court's judgement a special district is too big.

This case is important to the owners of 236,000 acres of land who put their property at risk to bring the Salt River Project into being and who leave it at risk to keep the Project operating. It is also important to millions of people ac-

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[14] See p. 16 n. 8, *supra*.

ross the country benefited by special districts which they have undertaken and whose representational schemes have now been called into question by the holding of the Court of Appeals.

Review by this Court is therefore required.

Respectfully submitted,

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May 2, 1980

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES, ROLAND W., et al.,
Plaintiffs-Appellants,
v.
BALL, GERMAIN H., et al.,
Defendants-Appellees.

No. 76-1918
OPINION
[Filed October 12, 1979]

Appeal from the United States District Court for the District of Arizona

Before: CHOY and KENNEDY, Circuit Judges, and HALL,[1] District Judge.

KENNEDY, Circuit Judge:

This appeal, from an action commenced in the District of Arizona, challenges the constitutionality of Arizona statutes which provide that voting in elections for directors of the Salt River Project Agricultural and Improvement and Power District (the District) is limited to landowners, with votes essentially apportioned to owned acreage. The appellants are citizens of Arizona residing within the geographical boundaries of the District. Each appellant either rents land or owns less than one acre of land within the District and is thus excluded from the voting franchise. The action was brought under 42 U.S.C. § 1983. The Arizona statutes challenged are Ariz. Rev. Stat. §§ 45-909 and

[1] Honorable Peirson Hall, Senior United States District Judge for the Central District of California, sitting by designation.

45-983.[2] The district court found those state statutes are consistent with the requirements of the fourteenth amendment and granted the District's motion for summary judgment. We reverse that determination. The district court also denied certification of the suit as a class action, and as to that aspect of the case we affirm.

I. FACTS

Under the Reclamation Act of 1902, the federal government and the State of Arizona established a joint project for storage and delivery of water in the Salt River Valley. The project was limited to agricultural lands within the physical boundaries of the project.

The federal government built water storage and distribution facilities and hydroelectric facilities for the project. The Reclamation Act required that properties benefited by the project bear the costs of construction, and the Salt River Valley Water Users' Association was organized, under Arizona corporate law, to pay those costs. Only persons

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[2] Section 45-909 provides:

> No person shall be entitled to vote at any election held under the provisions of this chapter unless he possesses all the qualifications required of electors for state officers under the general election laws, and is the owner of record of real property located within the boundaries of the district as of sixty days preceding a district election, and on which he has been assessed for county taxes . . .

Section 45-983 provies:

> [E]ach landowner possessing the qualifications of an elector shall be entitled to cast one vote at all elections . . . for each acre of land within the district owned by him.
>
> . . . [E]ach landowner possessing the qualifications of an elector who owns less than one acre of land within the district shall be entitled to a fractional vote . . . equal to the fraction of an acre owned by such elector.

After the district court rendered its decision, Ariz. Rev. Stat. §§ 45-909 & 45-983 were amended to read as quoted above. In reviewing the decision of the district court, we must look to the statute as it presently reads, not as it read at the time the district court rendered its decision. *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975).

holding project land could belong to the Association; only Association members could receive water from the project. The Association's obligations became pro rata liens on the lands of Association members.

By the 1930's the Association found the costs of financing project facilities overly burdensome. To alleviate this problem, the Salt River Project Agricultural Improvement and Power District was established. The District qualified as a municipal corporation. The District's bonds were eligible for tax-exempt status so that interest costs for the project were substantially reduced.

Under a 1937 agreement between the Association and the District, the Association agreed to continue to perform all obligations connected with the operation and maintenance of the project on behalf of the District. The Association also agreed to give title to project facilities to the District, subject only to whatever rights the federal government retained under the original transfer to the Association. The District agreed to provide whatever capital and operating funds the Association needed to operate project facilities. Pursuant to the 1937 agreement, the District now operates the water storage and distribution facilities. In addition the District generates electric power, and today the District is the second largest utility in Arizona. Ninety-eight percent of the District's total revenues are derived from electricity operations.

Arizona statutes mandate the voting system for the District. The District is subdivided into ten electoral divisions, each of which elects one director and three council members. A president and vice-president are elected at large. Qualified electors have votes for these offices apportioned according to the amount of land they hold. In addition, qualified voters elect two at-large directors (to become four in 1980) on a per-person voting basis. The twelve-member

Board of Directors and thirty-member Council administer the District.[3]

II. EQUAL PROTECTION CLAIM

Since its decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court has repeatedly applied the principle of one person-one vote, and it has invalidated restrictions on voter eligibility in many different types of elections. *See Hill v. Stone*, 421 U.S. 289 (1975); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Hadley v. Junior College District*, 397 U.S. 50 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School District*, 395 U.S. 621 (1969). The Court has on two occasions struck down laws that limit voting to landowners. *City of Phoenix v. Kolodziejski, supra; Cipriano v. City of Houma, supra.* In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), however, the Supreme Court made an exception to *Reynolds* and upheld a state law which permitted only landowners to vote in an election to choose the directors of a water district. Because *Salyer*, and the companion case of *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973) (per curiam), are the only cases since *Reynolds* which permit this type of voter restriction, the arguments of the parties here focus largely on the applicability of *Salyer* to the case before us.

In *Salyer*, plaintiffs challenged the voting system for a water district that allowed only landowners to vote, with votes apportioned according to the assessed valuation of the land owned. The Supreme Court, after examining the nature of the service provided by the particular district,

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[3] The 1976 amendments to the statute added the at-large directors and fractional votes. Previously all voting was on a per-acre basis with a one-acre threshold requirement.

concluded that "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group," 410 U.S. at 728, the water storage district fell within an exception to *Reynolds*.

Critical to an understanding of *Salyer* is the factual setting of the case. The water district consisted of 193,000 acres, all of it agricultural land, 85% farmed by one or another of four corporations. It had a total population of 77 residents. Assessments against landowners were the sole means of paying expenses of the District, so that landowners as a class bore the entire financial burden. Moreover, the reason for the District's existence and continued operation was to provide water for farming, *id.* at 728, and, as stressed by the court, the primary effect of its operations was upon agricultural lands. Although the District had authority to undertake certain flood control activities, the Court found these powers were incident to the exercise of its primary functions of water storage and distribution. *Id.* at 728 n. 8. The Court specifically noted that the District provided "no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." *Id.* at 728-29.

The case at hand is quite different. Although at one time the Salt River District did bear some similarities to the district in *Salyer*, today the size and nature of the projects of the District and the effect of its operations on all of the residents of Arizona are far more extensive than those of the district in *Salyer*. The Salt River District is engaged in far-reaching electric power operations. It is the second largest electric utility in the State of Arizona and services nearly a quarter million persons. The utility owns five hydroelectric facilities and four steam generating plants; it is a partial owner of three coal-fired steam generating facilities; and it is a participant in the Palo Verde nuclear plant.

The water operations of the Salt River District are also significantly more diverse than those in *Salyer*. The District is not concerned solely with providing water for agriculture. Its formerly rural area encompasses today eight Arizona municipalities, including major portions of Phoenix. About 25% of the total water delivered by the District goes to these cities for municipal uses, and an additional 15% of the district water is delivered for other nonagricultural uses, such as schools, parks, playgrounds, and subdivision purposes. In view of the broad scope and impact of its activities, the Salt River District cannot be characterized as having a special limited purpose.

Further, the activities of this District do not disproportionately affect landowners. Unlike *Salyer*, nearly 40% of the water delivered by the District is used and paid for in a manner unrelated to agriculture or landownership. As to the electric operations, nearly all the citizens in the district are vitally affected in ways unrelated to ownership of real property. As the Supreme Court stated in *Cipriano v. City of Houma*, 395 U.S. 701, 705 (1969) (per curiam), "the operation of the utility systems—gas, water, and electric—affects virtually every resident of the city." It is true that there are $290,000,000 of general obligation bonds outstanding that are secured by a lien on district lands. However, all the bonds have been serviced out of earnings of the District; and since 1973, all capital improvements have been financed entirely from bonds secured solely by a pledge of revenues. The earnings of the District have been sufficient to permit it to issue a total of $600,000,000 worth of revenue bonds, and these are all *junior* to the general obligation bonds. Ninety-eight percent of the District's substantial revenues are produced by its electric utility operations. Thus, unlike *Salyer*, the financial burden of operating the District does not fall entirely or even primarily on landowners; it falls instead on the purchasers of electricity.

Appellees argue, nevertheless, that the operations of the District do have a disproportionate effect on landowners. Noting the profits from the sale of electricity are used to defray irrigation expenses, they compare the District to a private company which permits only stockholders to vote for the board of directors. The comparison fails, however. This is a public entity, not a private company. The District is a political subdivision of the State of Arizona with the legal status of a municipality. Ariz. Const., art. 13, § 7. It is entitled to all the immunities and exemptions granted municipalities. Moreover, the scale of the District's operations simply does not permit the interpretation that the electric utility is a side venture that the District dabbles in to pick up a little extra money in order to benefit the landowners. The operation of the utility has taken on independent significance. In view of the magnitude of the electric utility operations and the large percentage of the water services which are used and paid for in a manner unrelated to land ownership, it would elevate form over substance to characterize the District as functioning solely for the benefit of landowners.

The *Salyer* Court, in analyzing whether the Tulare District had a "special limited purpose," noted that the district did not exercise "normal governmental authority." 410 U.S. at 729. *See Hadley v. Junior College District*, 397 U.S. 50, 56 (1970), *Avery v. Midland County*, 390 U.S. 474, 485 (1968). Appellees cite this language and argue that in this case neither the water nor the electric power activities of the District are governmental in nature. We cannot agree. While *Salyer* can be understood as holding that the provision of water for agriculture is not a governmental function, the water services provided by the Salt River District are not confined to agricultural uses.

With respect to the electric utility operations, appellees rely on *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) as support for the proposition that the provision of electricity is not a governmental function. The question before us, however, is altogether different from the issue

confronted in *Jackson*. There the issue was whether or not a privately owned utility was so closely regulated by the state that its actions were state actions under the fourteenth amendment. *Salyer* did not hold that the fourteenth amendment did not apply to the water district. The case assumed there was state action and dealt with the question of the requirements of the fourteenth amendment in that situation. The issue is not whether the Salt River District is a state entity, but whether, having made the decision to create the entity and provide for the election of its directors, the state can deny the electoral franchise to citizens whose economic interest and natural environment are vitally affected by the entity's operations.[4]

Salyer suggests that for purposes of this type of inquiry, the operation of an electric utility is governmental in nature. In reaching its conclusion that the Tulare District did not exercise normal governmental authority, the Court specifically noted that the district provided "no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." 410 U.S. at 728-29. This conclusion is further confirmed by *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam). There the Court concluded that the operation of a municipal utility system affected such a large percentage of the population that it

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[4] In *Niedner v. Salt River Project Agricultural Improvement & Power District*, No. 13597 (Ariz. Jan. 10, 1979), the Arizona Supreme Court held that the District's termination of an employee did not constitute state action implicating the fourteenth amendment. In the present case appellants do not challenge an action of the District. Rather, they contend that the Arizona statutes mandating the voting scheme of the District violate the fourteenth amendment. There can be no doubt that the enactment of those state statutes by the state government constitutes state action. Accordingly, we need not determine now if we would agree with the Arizona Supreme Court's holding that the District's acts do not involve state action.

was unconstitutional to permit only property taxpayers to vote in elections called to approve the issuance of revenue bonds by the utility.[3]

In this court the District makes repeated reference to statutory and decisional authority indicating that the District's principal purpose and obligation is to provide water to the lands within it. If this legal proposition is correct, then the district will no doubt comply with it or be subject to corrective actions by the courts or the Arizona legislature. It is not, however, an argument that justifies trying to skew the electoral system as an indirect way to produce that result. The electric utility operations of the district are so substantial in scope and are so closely interwoven with the water delivery functions of the district that it is not a special limited purpose district whose operations have a disproportionate effect on landowners as a class. The principle of one person-one vote cannot be abridged in these circumstances.

Implicit in appellees' contention lies a legal assumption that is quite incorrect. It is, specifically, that disproportionate representation may be used to prevent electors who have a direct and substantial interest in a government entity's operations from out-voting certain other electors who own land that constitutes part of the security for the entity's financial structure. Disproportionate electoral representation, under this unstated but implicit rationale, serves as a safety device to protect property interests or expectations of landowners. We find no holding or intimation in any controlling Supreme Court decision that can support such a view. The rationale for departing from the one person-one vote standard is altogether different. It is that under certain conditions, of most narrow dimension, there may exist a state created entity, limited to operations with little effect on the general electorate and a substan-

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[3] Subsequent to *Jackson*, the Supreme Court has cited and relied on *Cipriano* with no indication that its holding has been undercut by *Jackson*. *Hill v. Stone*, 421 U.S. 289, 296 (1975).

tially disproportionate effect on the interests of a discrete group permitted to vote. *Salyer*, 410 U.S. at 728-30. If, on the other hand, the operations of a state entity affect a diverse group of citizens, the franchise cannot be restricted to exclude those who have an interest in the election. *Hill v. Stone*, 421 U.S. 289 (1975); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 209 (1970); *Hadley v. Junior College District*, 397 U.S. 50 (1970); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (per curiam).

III. CLASS ACTION CERTIFICATION

Appellants argue that the district court erred in refusing to certify the suit as a class action. Appellants' complaint filed on July 28, 1975 stated that it was brought on behalf of the named plaintiffs and their respective classes under rule 23(b)(2) of the Federal Rules of Civil Procedure. A motion for certification was not filed, however, until February 24, 1976, when appellants filed their motion for summary judgment. The district court denied certification. We affirm its ruling in this respect.

The determination of class action status rests within the sound discretion of the district court. *Montgomery v. Rumsfeld*, 572 F.2d 250, 255 (9th Cir. 1978); *Hornreich v. Plant Industries, Inc.*, 535 F.2d 550, 552 (9th Cir. 1976). Having reviewed the record, we cannot say that the district court abused its discretion. Here, the relief sought will, as a practical matter, produce the same result as formal class-wide relief. *See Craft v. Memphis Light, Gas & Water Division*, 534 F.2d 684, 686 (6th Cir. 1976), *aff'd on other grounds*, 436 U.S. 1 (1977); *Ihrke v. Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir.), *vacated and remanded to dismiss as moot*, 409 U.S. 815 (1972). *Accord, Carter v. Butz*, 479 F.2d 1084, 1089 (3rd Cir.), *cert. denied*, 414 U.S. 1094 (1973). *See also Mead v. Parker*, 464 F.2d 1108, 1112 (9th Cir 1972) (dictum). *But see Fujishima v. Board of*

Educ., 460 F.2d 1355, 1360 (7th Cir. 1972). We are not unmindful of the benefits of a class action, *see* 3B Moore's Federal Practice § 23.40[3] at 23-296 n.9, but we conclude that in this case they would not be significant.

REVERSED in part, AFFIRMED in part.

Re: Roland W. James, et al. v. Germain H. Ball, No. 76-1918

HALL, District Judge, dissenting:

Upon a study of the majority opinion and a close reexamination of the briefs of the parties, I cannot escape the conclusion that what the court is holding is essentially that the plaintiffs, solely because they are users, are entitled to participate in all of the benefits as owners in the management and the operation of the defendant District. I fail to find anything in any of the cases cited or any of those upon separate research to indicate any "constitutional protection" to the plaintiffs who are simply owners and renters of property and have no interest or obligation whatsoever, substantial or otherwise, in repaying the hundreds of millions of dollars which have been borrowed and are now owed by the District to enable the district to give the plaintiffs the water and electricity which the plaintiffs use. The sale of electric power by the District was authorized by Congress in 1906, 34 Stats. 117: 43 U.S.C. § 522, when it was necessary to or would help in development of the project. The plaintiffs cannot make a claim that development and sale of power was not, and is not, necessary for the water. The majority opinion disregards this preemption of power.

The nonagricultural owners, who are residents and state voters, are given the equal right to vote as the agricultural owners, proportionate to the acreage ownership. But the plaintiffs seek here to make the owner of one-eighth of an acre [50 x 100 lot] *and* the renter who owns nothing, the same right to participate in the management of the hundred million dollar business of defendants as the landowner of any 500 acres of agricultural land whose land has

stood as security throughout the history of building the project and whose present share of lien for indebtedness is more than $3,000 an acre or a total of one and a half million dollars. The development of this project began 119 years ago in 1860. It became government operated after the Federal Reclamation Act of 1902. 32 Stats. 388: 43 U.S.C. § 371. To apply the same one man one vote to the Southern California Edison Company, for instance, would mean that user could have the same rights in management as the owner of $1,000,000 worth of stock.

Not only is there no provision in the Constitution, due process, equal protection or otherwise which suggests such a far-out result, but that is the logical result of the plaintiffs' contention.

The plaintiffs allege no property *damage* of any kind, no personal *inconvenience*, no personal *injuries*, nor *anything* which is measurable in the equivalent of money. In fact, their claim is founded, according to their Opening Brief, page 1, upon the claims that the "District's electric and water operations have an *important and substantial* effect and impact on their lives such that they are entitled to participate in district elections on an equal basis with all qualified electors regardless of property ownership." They ultimately actually seek a mandatory injunction, the equitable remedy which requires that the damage be *great* and *irreparable*.

The case, in my judgment, falls squarely within the holding of the Supreme Court in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) and the *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973).

I will not attempt to improve upon the discussions concerning *Reynolds v. Sims*, 377 U.S. 533 (1964); *Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970); *Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Avery v.*

Midland Company, 390 U.S. 474 (1968); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); and *Hill v. Stone*, 421 U.S. 289 (1975) which are done by the Supreme Court in the *Salyer* case.

The furnishing of electricty for public use, whether done by a city or otherwise, *is a proprietary business* and not a municipal or state business. It is "vested with public interest" only in the sense that it can be regulated by the state, *Nebbia v. New York*, 291 U.S. 502 (1934), which it is. It is not naturally for the protection of use of all persons. It is conducted for those persons who use it and pay for it. Thus, it is unlike a street, a road, a sewer, a gutter, street lights and so forth. Moreover, the granting of this right of a customer to the control of the property to which one has contributed nothing *merely because he is a customer* raises the question as to whether or not that in itself is in violation of the clause prohibiting the taking of private property for public use without just compensation as well as the due process clause.

The plaintiffs (Plaintiffs' Reply Brief, page 16) claim that the defendants are attempting to rely upon "undue deference to legislative schemes conceived of in days *now gone by*." Yet they claim to depend upon the legislative schemes set forth in the Constitution which have been adopted in "days gone by," more than 125 years before the defendants came into existence.

A detailed discussion of the controlling authorities in the case is as follows:

I. EQUAL PROTECTION CLAIM

A. Applicability of Salyer Test

Appellants challenge the voter qualification requirements for election of District officials, claiming that these requirements violate the equal protection clause of the four-

teenth amendment by invidiously discriminating against them and persons similarly situated who own less than one acre of real property.[6]

In *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973), plaintiff challenged the voting system for a water district that allowed only landowners to vote, with votes apportioned according to the assessed valuation of the land owned. Tracing the development of equal protection analysis of apportionment and voter qualifications in local elections, the Supreme Court observed that in cases invoking a rigid one person, one vote standard, the local entities involved exercised "general governmental power"[7] or performed "important governmental functions."[8] *Id.* at 727. By contrast, the water storage district in *Salyer*, "although vested with some typical governmental powers, ha[d] relatively limited authority." Its primary purpose was simply to provide for the acquisition, storage, and distribution of water within the district. It provided "no other general public services" such as schools, fire or police protection, buses, or roads. Moreover, the Court noted, the district's actions "disproportionately affect landowners," thus supporting limitation of the franchise to them. *Id.* at 728-29.

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[6] The district court granted summary judgment in favor of the District. Summary judgment may be granted " 'only where there is no genuine issue of any material fact or where viewing the evidence . . . in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law.' " Caplan v. Roberts, 506 F.2d 1039, 1042 (9th Cir. 1974). *See* Fed. R. Civ. P. 56.

Here the parties have stipulated to the facts. Such stipulations conclusively establish the material facts they contain. United States v. Huston, 547 F.2d 104, 107 (9th Cir. 1976). Our task, then, is to determine whether the district court reached the proper legal conclusion in granting summary judgment.

[7] *E.g.*, Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969).

[8] *E.g.*, Hadley v. Junior College District, 397 U.S. 50 (1970); Kramer v. Union School District, 395 U.S. 621 (1969).

By distinguishing the Tulare Water Storage District from the government bodies involved in previous representation decisions, the Court explicitly denied the applicability of strict one person, one vote equal protection analysis to such special districts. *See Holt Civic Club v. Tuscaloosa*, 47 U.S.L.W. 4008, 4011 (U.S. Nov. 28, 1978). The Court based this distinction largely upon its decisions in *Hadley v. Junior College District*, 397 U.S. 50 (1970) and *Avery v. Midland County*, 390 U.S. 474 (1968).

Avery involved an equal protection challenge to the method of selecting Midland County, Texas, officials that gave disproportionate influence to voters in thinly populated districts. The Court stated the general rule:

> When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates lawmaking power to local government and provides for the election of local officials ... it must insure that those qualified to vote have the right to an equally effective voice in the election process.

390 U.S. at 480. The county argued that this rule should not extend to the county governing board because the board performed administrative rather than legislative functions. The Court noted, however, that the board possessed the "lawmaking power" "to make a large number of decisions having a broad range of impact on all the citizens of the county." The board determined tax rates, equalized assessments, issued bonds, and allocated the county's funds with broad statutory authority. The board also made "both long-term judgments about the way Midland County should develop—whether industry should be solicited, roads improved, recreation facilities built and land set aside for schools—and immediate choices about competing needs." *Id.* at 483. Given these broad powers, the Court concluded that the general rule should apply to the county board. *Id. at 484-85.*

The county also argued that the extra influence of the thinly populated districts was justified because the county officers' work "disproportionately concern[ed]" rural areas. *Id.* at 483. Because the board possessed authority to make numerous decisions affecting all of the county's citizens, the Court did not decide whether this claim, if true, would support apportionment "in ways which give greater influence to the citizens most affected . . ." *Id.* at 484. Instead, the Court summarized its decision:

> We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having *general governmental powers* over the entire geographic area served by the body.
>
> This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in designing mechanisms of local government suitable for local needs and efficient in solving local problems . . . .
>
> . . . .
>
> . . . Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with *general governmental powers* over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

Id. at 484-86 (emphasis added).

Thus, *Avery* recognized the necessity for an escape from the "straitjacket" application of equal protection requirements when dealing with local government units lacking general governmental powers. This contemplated exception did not require the alternative justification for disproportionate voting rights argued in that case: that the exercise of the county officers' powers had a disproportionate impact upon particular citizens.

The Court similarly decided *Hadley*, involving an equal protection challenge to apportionment that diluted plaintiffs' votes for school district trustees. Though the Court opined that an exception to the strict application of equal protection requirements would be observed where a local body's functions were "far removed from normal governmental activities *and* . . . disproportionately affect different groups," 397 U.S. at 56 (emphasis added), its analysis demonstrates that strict one person, one vote requirements will not be imposed when the first of these elements is absent. The Court stated:

> Appellants . . . argue that the junior college trustees exercised *general governmental powers* over the entire district and that under *Avery* the State was thus required to apportion the trustees according to population on an equal basis, as far as practicable. Appellants argue that . . . the trustees can levy and collect taxes, issue bonds . . ., hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college . . . . We feel that these powers, while not fully as broad as those [in *Avery*], certainly show that the trustees performed *important governmental functions* [which] have sufficient impact throughout the district to justify the conclusion that . . . *Avery* should also be applied here.
>
> . . . .
>
> . . . [W]e see nothing in the present case that indicates that the activities of the trustees fit in [the *Avery* exception]. *Education has traditionally been a vital government function, and these trustees . . . are governmental officials in every relevant sense of that term.*

Id. at 53-54, 56 (emphasis added). Thus the Court concluded that the exception enunciated in *Avery* was inapplicable solely because the officials in *Hadley* possessed vital and traditional governmental powers. Indeed, its conjunctive inclusion of the fact that these powers had an

effect "throughout the district" appears as a prerequisite to application of the strict equal protection requirements of *Avery*, not to the availability of an exception from them.

Salyer reinforces this emphasis on whether the local body possesses "general governmental powers" and performs "important governmental functions." The *Salyer* court explicitly relied upon *Hadley* and *Avery* in fashioning its exception to the strict one person, one vote standard. And although the Court noted that the Tulare Water Storage District also had a disproportionate impact on landowners, its reference to this fact in "not only, but also" fashion underscored its primary reliance upon the fact that the district lacked general govermental powers. I conclude that *Salyer's* reference to disproportionate effect was not meant to expand the constitutional requirements of *Avery* and *Hadley;* the critical inquiry remains focused on whether the local body performs traditional general governmental functions. *See Salyer*, 410 U.S. at 727.

The Salt River District does not perform traditional general governmental functions. The legislature has defined the District's purpose as securing water necessary to improve agricultural land. Ariz. Rev. Stat. § 45-903. *See Uhlmann v. Wren*, 97 Ariz. 366, 374, 401 P.2d 113, 124 (1965). The District's powers are incidental to that task. *Local 266 v. Salt River Project Agricultural Improvement & Power District*, 78 Ariz. 30, 43, 275 P.2d 393, 402 (1954). This limited role does not entail the exercise of general governmental powers.

Moreover, though some municipalities furnish water and electric service, these functions are not traditionally governmental services. In another context, the Supreme Court has noted that "the supplying of utility service is not traditionally the exclusive prerogative of the State" and is not "traditionally associated with sovereignty." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974). *Cf. National League of Cities v. Usery*, 426 U.S. 833, 854 n.18 (1976). And the Arizona Supreme Court has described the

Salt River District as having business and economic rather than governmental purposes. *Local 266,* 78 Ariz. at 43, 275 P.2d at 402.

Finally, even if some publicly owned utilities can be compared to vital governmental services, this District is not such a utility. The Arizona Supreme Court has written of the District:

> Most municipal corporations are owned by the public and managed by public officials .... Such is not the case here .... The public does not own the District. A governmental entity such as a city or town does not manage or benefit from the profits of this District. Instead the owners are private landholders. The profits from the sale of electricity are used to defray the expense in irrigating these private lands for personal profit. The public interest is merely that of consumers of its product, for which they pay .... *The District does not function to "serve the whole people" but rather the District operates for the benefit of these "inhabitants of the district" who are private owners.*

Local 266, 78 Ariz. at 44, 275 P.2d at 402-03. (emphasis added).

In short, the District does not perform functions akin to those of general governmental bodies. Accordingly, the *Salyer* test and not the strict one person, one vote standard of equal protection is applicable in evaluating the District's voter qualification requirements.

The District's disproportionate impact upon District landowners strengthens our conclusion that the *Salyer* test should be employed here. Although the District's policies affect electrical consumers both within and without the District's geographical area as well as landowners within the District, both the legislative purpose and practical effect of the District's activities disproportionately concern the landowners.

The Arizona legislature created the District to benefit landowners in the District. *See Uhlmann*, 97 Ariz. at 374, 401 P.2d at 118-19; *Local 266*, 78 Ariz. at 43, 275 P.2d at 402-03. For example, the District may sell surplus water and power to those outside the District in order "to reduce the cost of irrigation, drainage and power to the owners of the lands in the district ...." Ariz. Rev. Stat. § 45-903 (A)(7). Accordingly, revenues from electrical operations have been used to subsidize water functions. The parties characterize this subsidy to District landowners as equivalent in amount to dividends paid to common stockholders in electric utility companies. The parties' concept of the District's electric operations as a form of income for District landowners underscores the District's purpose to benefit District landowners.

Just as landowners within the District benefit disproportionately from successful District operations, so too financial reverses of the District disproportionately affect them. Arizona state law provides that bonds issued by the District create liens upon the real property within the District. Ariz. Rev. Stat. § 45-1047(A). And a state statute specifically provides for raising District revenues by taxing the landowners in the District. Ariz. Rev. Stat. § 45-1014(B). Thus, District financial losses have a disproportionate effect on landowners. This potential liability is particularly significant since the Supreme Court in *Salyer* based its finding of disproportionate effect largely on the fact that Tulare Water District charges constituted a lien upon land within the district. 410 U.S. at 729.

I conclude that the District's actions disproportionately affect District landowners as a group in terms of District purposes, its successful operations, and the liabilities it may create. Thus, whether *Salyer* is read as emphasizing possession of general governmental powers, as we think proper, or

as warranting consideration of the proportionality of effect as well, the challenge to the District's electoral system must be evaluated according to the standards set forth in that decision.

B. Acceptability of District's Voting System

In *Salyer*, the Supreme Court wrote:

> Even though appellants derive no benefit from the [strict one person, one vote] cases, they are, of course, entitled to have their equal protection claim assessed to determine whether the State's decision to deny the franchise to residents of the district while granting it to landowners was "wholly irrelevant to achievement of the regulation's objectives." *Kotch v. River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947).

410 U.S. at 730. I find that the Salt River District's voting scheme is not wholly irrelevant to the legislative objectives in creating the District.

In providing for the creation of the District, the Arizona legislature intended to assist landowners in irrigating their land. *See Uhlmann*, 97 Ariz. at 374, 401 P.2d at 118-19; *Local 266*, 78 Ariz. at 43, 275 P.2d at 402-03; Ariz. Rev. Stat. § 45-903. Vesting voting control in those landowners, thereby allowing them to control the agency designed to benefit them, is clearly not irrelevant to that legislative objective.

Moreover, in *Salyer*, the Supreme Court found that the California legislature "could quite reasonably have concluded" that landowners should be given control of the Tulare district because the district's liabilities would fall upon the landowners in the form of liens upon their lands. 410 U.S. at 730. Potential liabilities of the Salt River District also fall upon the District landowners as liens and tax assessments upon the land. Ariz. Rev. Stat. §§ 45-1047(A), 45-

1014(B). The Arizona legislature, therefore, could similarly have reasonably concluded that the same landowners responsible for the District's potential liabilities should have voting control of the District.

Appellants respond that all persons who use District water or electricity are interested in District policies. But as the Supreme Court wrote in *Salyer*:

> No doubt residents within the district may be affected by its activities. But this argument proves too much. Since assessments imposed by the district become a cost of doing business for those who farm within it, and that cost must ultimately be passed along to the consumers of the produce, food shoppers in far away metropolitan areas are to some extent likewise "affected" by the activities of the district. Constitutional adjudication cannot rest on any such "house that Jack built" foundation, however.

410 U.S. at 730-31.

I conclude that the District's voting system is not wholly irrelevant to the legislature's objectives in creating the District. Accordingly, the system does not violate the equal protection provisions of the fourteenth amendment.[9]

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[9] Appellants suggest that corporations are unconstitutionally denied the right to vote in District elections. I conclude below, § IV *infra*, that the district court did not abuse its discretion in refusing class certification. Because the plaintiffs are all noncorporate individuals, "the [corporate] claim of these petitioners falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." Warth v. Seldin, 422 U.S. 490, 509 (1975). *See* Construction Industry Association of Sonoma County v. City of Petaluma, 522 F.2d 897, 904 (9th Cir. 1975), *cert. denied*, 424 U.S 934 (1976). I therefore do not consider this contention.

II. Irrebuttable Presumption Claim

Appellants additionally claim that the District's voting system impermissibly creates two irrebuttable presumptions: that only landowners are qualified to participate in District elections, and that individual interests in District matters are affected by the size of land holdings.

The Supreme Court has indicated that at times determination of eligibility for public benefits must be made on a case-by-case basis because generalized rules of eligibility inadequately reflect variations within administratively defined classes. *See, e.g., Vlandis v. Kline,* 412 U.S. 441, 452 (1973). In the instant case, however, the underlying basis of appellants' claim is not that individualize resolution of voter qualification is needed to reflect differences in voters' interests. Instead, appellants argue that the present voting system deals unfairly with the entire class of small landowners and renters. Irrebuttable presumption analysis is not well suited for such claims.

Moreover, within the context of Supreme Court decisions dealing with irrebuttable presumptions, the presumptions embodied in the District's voting system are acceptable. In *Matthews v. Lucas,* 427 U.S. 495, 509 (1976), the Supreme Court instructed that

> presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny.

See Weinberger v. Salfi, 422 U.S. 749, 784 (1975). Because we concluded earlier that the District's voting system meets the standard of *Salyer,* the "applicable level of scrutiny" in the instant case, the presumptions implicit within that system are not impermissible. Indeed, the Supreme Court's

conclusion in *Salyer* that a voting system similar to the instant scheme was constitutional implies that the Arizona legislature may make precisely the kind of presumptions necessarily underlying such voting systems.

III. Class Action Certification

Appellants argue finally that the district court erred in refusing to certify the suit as a class action. The determination of class action status rests within the sound discretion of the district court. *Montgomery v. Rumsfeld*, 572 F.2d 250, 255 (9th Cir. 1978); *Hornreich v. Plant Industries, Inc.*, 535 F.2d 550, 552 (9th Cir. 1976). Having reviewed the record, I cannot say that the district court abused its discretion. Moreover, given my rejection of appellants' claim that the voting statutes are unconstitutional on their face, the denial of class certification, even if improper, could not have infringed the rights of plaintiffs or members of the purported class.

I would affirm the lower court in all respects.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES, ROLAND W., FITZSIMMONS, JAMES R., BRAHS, DWIGHT M., SACCO, FRANK, and MAFFEO, JOHN H., on behalf of themselves and their respective classes,

Plaintiffs/Appellants,

vs.

BALL, GERMAIN H., CONOVALOFF, ALEX M., ROSSEAU, BILL, SMITH, LEO C., WILLIAMS, JOHN M., JR., HURLEY, THOMAS P., et al.,

Defendants/Appellees.

JUDGMENT
No. 76-1918
DC CV
75-498-PHX
WEC
[Filed October 12, 1979]

APPEAL from the United States District Court for the District of Arizona (Phoenix)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed in part and affirmed in part.

Filed and entered October 12, 1979

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

ROLAND W. JAMES, et al., Plaintiffs, vs. GERMAIN H. BALL, et al., Defendants.	No. CIV 75-498 PHX WEC STIPULATED STATEMENT OF FACTS [Filed February 24, 1976]

Plaintiffs and Defendants present herewith a joint stipulated statement of facts, along with exhibits, which they agree may be considered in connection with their simultaneously-filed cross Motions for Summary Judgment. The facts stated are admitted as true by both parties only for purposes of their respective motions for summary judgment.

Both parties contributed separate facts to the statement, but for sake of continuity it was agreed to organize the statement in the form presented. Nothing should be inferred from either the order or length of particular facts stated. Further, while admitting the truth of all facts stated, each party reserves the right to contest the materiality or relevance of any fact.

DATED this 24th day of February, 1976.

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STIPULATED STATEMENT OF FACTS

I. PARTIES

A. Nature of Action

1. This action challenges the constitutionality of the landowner and acreage voting system of the Salt River Project Agricultural Improvement and Power District ("District"), an agricultural improvement district formed under the laws of the State of Arizona, A.R.S. § 45-901, *et seq.*, which is comprised of 260,188 acres located in Maricopa County, Arizona. The District and the Salt River Valley Water Users' Association ("Association"), a corporation organized under the laws of the Territory of Arizona in 1903, operate the Salt River Project, a federal reclamation project. (The phrases "Salt River Project" and "Salt River Reclamation Project" will be used synonymously herein to refer to the federal reclamation project.)

B. Plaintiffs

2. Plaintiffs FRANK SACCO and DWIGHT M. BRAHS are citizens and registered voters of the State of Arizona who reside on District lands. These plaintiffs have no interest in any real property located within the District. Each is not eligible to participate in the District's elections because he does not own real property as required by A.R.S. § 45-909 (1975 Supp.). It is agreed that there are many others similarly situated. These two plaintiffs desire to vote in District elections on an equal basis with all persons residing within the District and otherwise qualified to vote for state officers.

3. Plaintiffs ROLAND W. JAMES, MARY FITZSIMONS, JAMES R. FITZSIMONS and JOHN H. MAFFEO are citizens and registered voters of the State of Arizona residing on District lands. Along with a substantial number of others, these plaintiffs have ownership interests in fractional acres of real property located within the District, and are entitled to cast a fractional vote in District elections.

Each of these four plaintiffs desires to exercise his or her elective franchise in District elections on an equal basis with other persons residing within the District and otherwise qualified to vote for state officers.

C. Defendants

4. Defendants GERMAIN H. BALL, ALEX M. CONOVALOFF, BILL ROUSSEAU, LEO C. SMITH, JOHN M. WILLIAMS, JR., THOMAS P. HURLEY, WILLIAM P. SCHRADER, JOHN S. HOOPES, W. LARKIN FITCH, THOMAS J. FINLEY and KARL F. ABEL are the members of the Board of Directors of the District, and its President, respectively.

II. HISTORY OF RECLAMATION IN THE SALT RIVER VALLEY

A. The Salt River Federal Reclamation Project

5. Irrigation of the Salt River Valley, within which the Association and the District boundaries lie, was begun by settlers in about 1867. The river flow was erratic, varying from a small stream to enormous floods. Shortly after settlement began, especially during years of drought, the supply of water at low river stages was inadequate for the land in cultivation. River flows in excess of immediate needs or canal capacities were lost, due to the lack of storage facilities. Maintenance of the brush and rock diversion dams also became a problem, for they were often washed out at the beginning of a flood and could not be replaced until the water was again low in the river. Years of good water supply were followed by years of drought, causing the loss of valuable vineyards, farm lands and orchards. In 1895 a few of the farmers in the Valley formed what they called the "Farmers Protective Association", the prime purpose of that Association being to secure legislation concerning water rights. Various farmers from the Salt River Valley were instrumental in lobbying the Reclamation Act of 1902 through the United States Congress for the purpose of securing comprehensive federal assistance for the systematic reclamation of lands of the Salt River Valley. The Salt

River Project was originally authorized by the Secretary of the Interior on March 14, 1903, in accordance with the Reclamation Act of 1902 (32 Stat. 33), and was the first reclamation project authorized under the Federal Reclamation Act.

6. Shortly after the authorization of the Salt River Reclamation Project, the federal government established a Board of Survey to determine what lands were capable of being benefited for agricultural purposes by the Project. In selecting those lands, the Board of Survey excluded lands actually put to urban uses (referred to as "townsite lands"). The area so designated by the Board Survey as eligible for Salt River Project water is referred to as the "Salt River Reservoir District."

7. After authorization of the Salt River Project in 1903, the Government constructed a large dam and reservoir on the Salt River known as the Theodore Roosevelt Dam. It also purchased and consolidated the various canals, ditches and other distribution facilities to form a highly developed irrigation system within the Salt River Project area.

B. Salt River Valley Water Users' Association

8. Immediately after the Salt River Project was created, the United States needed a contracting entity to assure repayment of construction costs allocated to each benefited landowner under 43 U.S.C. § 461 *et seq.* for construction of Theodore Roosevelt Dam. The Salt River Valley Water Users' Association was organized as an Arizona corporation under the laws of the Territory of Arizona in 1903 to serve as the entity with which the United States could deal as representative of the landowners for whose benefit the irrigation system was being constructed. The Articles of the Association were worked out by the joint effort of the landowners under the proposed project and the officials of the United States Reclamation Service. Shareholders of the Association are the owners of land which has been subscribed into the Association.

9. The contract between the Association and the United States providing for cooperation between the Association shareholders and the United States Government in the construction and financing of the Salt River Project was entered into on June 25, 1904, and is attached hereto as Exhibit B. In the 1904 contract the Association assumed the obligation to repay to the United States all construction charges owed to the United States by its member-shareholders for the irrigation system constructed for their benefit. The Government required membership in the Association as a condition of receipt of stored and developed water from the reclamation project. Exhibit B, Para. 2. The Secretary of the Interior reserved the right to approve or prescribe by-laws of the Association pertaining to water use and administration of the Association. Exhibit B, Para. 8.

10. The irrigation system for the lands of the Association's shareholders was operated by the United States Reclamation Service up to September 6, 1917, when the United States Government and the Association (after approval of the contract at an Association shareholders' election) entered into a further contract (attached hereto as Exhibit C) by which the operation, maintenance, and control of the Salt River Project were vested in said Association subject, however, to termination by either party in the manner therein stated, and the payment of the construction charges amounting to $10,166,021.97 due the United States.

11. Under the 1917 contract and later amendments thereto, the Association has operated and maintained, and is now operating and maintaining, the Salt River Project water delivery system and has under its Articles and By-Laws levied and collected assessments upon the lands of its shareholders to pay for operation and maintenance, for the construction charges due the United States, and for the improvements, additions and betterments of the said works made from time to time by the Association.

12. Before the management of the Salt River Project was taken over by the Association, the United States had constructed as incident thereto with government and Association funds, a hydroelectric power system, at a cost of approximately $4,500,000, to produce power to be used by the Association in support of its primary irrigation activities.

13. In order to protect its investment, and increase the revenue therefrom and the amount of water available for irrigation, the Association undertook in the 1920's and 1930's to increase the number of water storage and hydroelectric facilities. In addition to Mormon Flat Dam, constructed in 1923-25, the Association constructed Horse Mesa Dam in 1924-27 and Stewart Mountain Dam in 1928-30.

14. The Association contracted with the United States on November 6, 1935 (Exhibit F herein), later supplemented on October 14, 1936 (Exhibit G herein), for the construction of Bartlett Dam to store water on the Verde River, and for various repairs to Project works. Of the $7,500,466 cost of that project, the Association assumed the obligation to repay to the United States $6,550,361. Of the latter amount, $725,282 remains unpaid by the Association as of December 31, 1975.

15. Until 1937 the Association continued to manage, operate and maintain the Salt River Project directly. Financing for expansion of the water and power system was obtained through the sale of corporate bonds of the Association, secured by lien upon Association subscribed lands, as reflected in the list of bond issues set forth in Paragraph 50, *infra*.

16. The primary purpose for the acquisition and construction of the Salt River Project under the Federal Reclamation acts was for the development, storage and distribution of water for the irrigation of arid and semi-arid lands. The development, storage, and distribution of water to Association-subscribed lands was the primary purpose of

the Association in contracting with the United States to guarantee the repayment of construction funds and to operate the Salt River Project.

17. The development and sale of electrical power in connection with the Salt River Project by the United States and by the Association was undertaken not for the primary purpose of providing electricity to the public but to support the primary irrigation functions by supplying power for reclamation uses and by producing revenues which could be applied to increase the amount and reduce the cost of water to Association subscribed lands.

18. The Association under its current Articles of Incorporation derives its income from the following sources:

(1) Mandatory Water Assessments. (Art. XII, § 3(b)).

(2) Additional Water Delivery Charges. *Id.*

(3) Power Revenues. (Art. XII, 1, First.)

(4) Stock Assessments. (Art XII, § 1, Second, § 4.)

The Association's ultimate financing power if other revenues are insufficient is its acreage assessment power, which was last exercised in 1951. Association assessments when levied remain until paid a lien on the lands of the shareholders against which they are levied and on the stock appurtenant thereto.

The rights and obligations of membership in, and subscription to the Articles of, the Association are appurtenant to the land and run with the land.

III. THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT

A. History

19. In the mid-1930's the Association sought for a means of reducing the expenses of the operation of the Project, including interest expense. It therefore occurred to the officers of the Association that if a District could be organized under the Agricultural Improvement District Act which would issue its bonds for the purpose of providing money to take up the outstanding bonds of the Association, the bonds of the District could be placed at a much lower rate

of interest than those issued by the Association as a private corporation, and the shareholders of the Association, who, of course, would ultimately pay the District bonds, would thus be saved a very large sum of money each year. The Agricultural Improvement District Act provided for the organization of Districts which would be authorized to provide means of irrigation to the lands within such districts.

20. The Agricultural Improvement District Act, Revised Code of 1928, §3467 through 3514; 1922 Laws, Ch. 23, allowed creation of districts to be governed by three- or five-member boards. R.C. §3471. Such districts could be formed only within federal reclamation projects. R.C. §3467. All landowners were entitled to one vote each in the elections of such districts. R.C. §3473. Such districts enjoyed an *ad valorem* taxing power on real property within the District. R.C. §3498.

21. In January 1936, proceedings were initiated before the Maricopa County Board of Supervisors to create an agricultural improvement district coextensive with the boundaries of Association member land. Many shareholders of the Association objected to the formation of a district or contracting with it by the Association since voting in the district was per capita rather than by acre as in the Association. Many shareholders were also opposed to the *ad valorem* taxing power of the proposed district. The Association, therefore, determined not to proceed with final formation of a district until those and other objections could be resolved.

The Association therefore requested amendment of the Agricultural Improvement District Act to allow all landowners to vote on an acreage basis, and to establish a one-acre minimum for voting, as was the practice under Association elections. The Association also requested amendment of agricultural improvement districts' taxing power from *ad valorem* to acreage to conform such taxing power to the assessment power of the Association.

The Association also requested that the Legislature amend the Agricultural Improvement District Act by including among the purposes of such districts the reduction of the cost of irrigation, drainage and power to the owners of the land in the district by the sale of surplus water or power, the financing or refinancing as its own obligation of debt incurred or proposed to be incurred by any public or private agency in the construction, maintenance, improvement or replacement of the structures and equipment necessary or useful for the accomplishment of any of the purposes of the District. Cf. A.R.S. § 45-903 A 7 and 8.

22. The Legislature in November 1936 (Laws 1st Sp. Sess. 1936, c. 10) enacted the amendments requested by the Association.

The acreage taxing power of agricultural improvement districts (A.R.S. 45-1014) is now identical to the assessment power of the Association, in that District taxes are assessed on an acreage basis and become liens upon lands until paid (A.R.S. § 45-1015 B [1956]), and therefore have the same effect as Association assessments.

23. The officers of the Association caused a District to be organized under the Act encompassing the land which had subscribed to Association membership, provided for the issuance by the District of $13,000,000 of its bonds, and then caused a contract to be entered into between the District and the Association, the substance of which was, *inter alia*, that the District was to issue bonds and turn the proceeds over to the Association, and levy the necessary taxes to pay the bonds as they became due, while the Association was to use the proceeds of the bonds to pay off $13,000,000 of its outstanding indebtedness, and to collect from its members a sufficient amount of money to reimburse the District for the amount of taxes it was compelled to levy to meet the new bonds. The relationship between the Association and the District has often been described by the Arizona Supreme Court as one of "alter egos in substance, though not in law." The ultimate result of these transac-

tions and the District's status as a municipal corporation, with its securities exempt from taxation, has been a savings of millions of dollars to the shareholders of the Association.

24. Under the terms of the contract of March 22, 1937 between the Association and the District (Exhibit H, *infra*), the Association transferred, subject to the paramount interest of the United States, all its property to the District and agreed to continue to perform all its obligations in connection with the care, operation, and maintenance of the Salt River Project on behalf of the District. The District agreed to provide capital and operating funds to the Association to support the operation of the Project by the Association. As amended in 1944 and 1949, the contract now provides that the District itself operate the power function of the Salt River Project. The Association continues to operate the water delivery system as an agent for the District.

25. In the 1940's the Commissioner of Internal Revenue asserted deficiencies in income tax against the Association for power revenues applied to offset water costs without deduction for losses incurred in water operations. The Association set up a variety of defenses to this assessment, but in 1949 the dispute was settled by the payment of $100,000 in satisfaction of all past assessments. As a part of this settlement, the Association amended its 1937 contract with the District to have the District assume the actual operation of the power system to make clear that the revenues of the power system are exempt from federal income taxation under the then Section 116 of the Internal Revenue Code, which excludes from gross income any income derived from any public utility or the exercise of any essential governmental function and accruing to any state, or any political subdivision of a State. Subsequent to this settlement and to the 1949 amendment to the 1937 contract, power revenues continue to be applied to offset the deficits in water operation costs and are not considered by the IRS to be taxable income to the Association.

(The Commissioner of the IRS was apparently in error in refusing to allow any deduction for losses sustained in the water operations by the Association, as is now indicated by *Anaheim Union Water Co. v. Commissioner*, 321 F.2d 253 (9th Cir. 1963). The *Anaheim* case allowed non-profit water companies which furnished water and water services only to their shareholders to deduct against oil royalties, rentals and miscellaneous income the entire amount of the water costs including those in excess of charges to the shareholders for water services.)

B. Administration and Voting of the District

26. The statutes allow two forms of administration for agricultural improvement districts. Under the first, A.R.S. § 45-931 through § 45-942, a district is governed by a Board of Directors of between three and nine members. A.R.S. § 45-981 B. The District is governed under the alternate form, A.R.S. § 45-961 through 45-968, which allows for governance by a ten-member Board of Directors (the President is also an ex officio member) and a thirty-member Council. The District is divided into ten division, each of which elects one Director and three Council members. A President and Vice-President are elected at large. The boundaries of the electoral divisions of the Association and the District are virtually identical. The alternative form of administration is virtually identical to the governmental structure of the Association.

27. The statute allows for equal voting among qualifying landowners, or for acreage voting if so requested in the organization petition. The petition for organization of the Salt River Project Agricultural Improvement and Power District provided for elections on an acreage basis after the initial organization election. A.R.S. § 45-983. The election for formation of the District, however, was conducted on a one man, one vote basis among qualifying landowners. After the formation of the District, its elections have been conducted on an acreage basis.

28. To qualify to vote in District elections, electors must own taxable property within the District and possess the qualifications required of electors for state officers. Otherwise qualified electors of the District need not reside within the District to be entitled to vote their land in District elections. A.R.S. § 45-909.

29. In 1969 the Legislature amended the District's voting system to allow owners of fractional acreage to vote fractionally. A.R.S. § 45-983 (1975 Supp.). In the same year the Association amended its Articles of Incorporation to allow identical voting of fractional shares. Previously, a one-acre minimum landholding was required to vote in District and Association elections. Association Articles, Art. VII, §2. The effect of these changes was to give individual landowners a vote in Association and District elections in proportion to the lien on their land. As land use changes from agricultural to urban uses, therefore, the degree of urban participation allowed in District elections proportionately increases.

30. General elections of the Association and of the District are conducted simultaneously at the same locations by the same election officers on the first Tuesday of April of each even numbered calendar year. The Association elections are conducted pursuant to Article VII of its Articles, the District elections are conducted pursuant to A.R.S. § 45-981 through 45-992 (1956 and 1975 Supp.).

C. District-Association Relationship

31. To the extent that the Association and the District have identical boundaries, identical constituencies, and identical purposes, there has been since 1937 a close cooperation and consistent agreement over policy between the two in the management of the Salt River Project. The management staffs of the District and of the Association have been the same since shortly after the District took over operation of the entire Project in 1949.

32. The District was formed by the Officers of the Association, with the cooperation of the Legislature, for the immediate purpose of refinancing as its own obligations outstanding debts and of refinancing future debt in connection with the Salt River Project, all at the more advantageous interest rates available to municipal corporations. The mechanism for achieving this purpose was to form the District, assign to it the Association property rights and duties, and authorize it to perform contract obligations, which would serve the same purpose and ends which the Association has served and pursued.

33. The Association and its member landowners would not have transferred title to its property and control of the Salt River Project, including the power system, to a public body governed under a voting system without acreage voting and open to all qualified state electors solely on the basis of residence on District land.

34. The District was organized for the purpose of continuing the operations of the Association, the principal objective of which was to provide water for use within the geographic boundaries of the Association and District. Landowners were the intended beneficiaries *inter alia* because electric revenues were to be used to reduce the cost of development, storage and distribution of water to District lands. Subsequent to its formation in 1937, the District has continued to use electric revenues to defray the expense of providing water to District lands. The primary legislative purpose of the District is to provide water to District lands.

D. District Voting Information and Statistics

35. As of August 1975, 141,474.61 acres within the District were eligible to be voted in District elections. This is approximately 60% of the total number of acres within the District, excluding streets, alleys, canal rights-of-way, and

the Salt River riverbed. (Property held by corporations, municipalities, or other governmental bodies may not be voted, but property held by municipalities or other governmental bodies is not subject to the District's taxing power.)

36. The following table shows the number of people voting in District elections since 1970 and the total number of acres voted:

Election Year	Number of Voters	Number of Acres Voted
April 7, 1970	621	19,074.24
April 4, 1972	984	43,068.98
April 2, 1974	561	15,219.73

37. Between 1937 and 1974 the relative land uses in the District changed from 5.6% urban and 94.4% agricultural to 47% urban and 53% agricultural. (For the purposes of these statistics it is arbitrarily assumed that land parcels of one acre or less are urban and larger parcels are agricultural.) In 1974, 22.4% of all water delivered by the District and Association was delivered to municipalities; 15.% was put to other nonagricultural uses, and the balance was used in agriculture. Portions of eight Arizona municipalities are located within the geographic boundaries of the District — Phoenix, Mesa, Tempe, Scottsdale, Glendale, Chandler, Peoria, Tolleson and Gilbert. Substantial numbers of persons in the Phoenix metropolitan area reside on District lands.

E. Criteria for Inclusion of Lands Within District Boundaries

38. All lands included within the boundaries of the District were lands susceptible of irrigation by the same general system of irrigation works. Lands otherwise within the exterior boundaries of the District but excluded from the boundaries of the District were lands which would not be benefited generally or especially by the irrigation works of the District. The total acres as established by order of the Board of Supervisors on January 25, 1937 is 260,188 acres. At present, the total number of acres in the District, excepting canal rights-of-way, streets, alleys, and the Salt

River riverbed, is 236,482.66 acres. The total area excluded from the District but lying within the exterior boundaries of the District is 84,131 acres. Those areas excluded because they are not susceptible to irrigation by reason of high ground amount to a total of 39,494 acres. Approximately 35,021 acres are excluded from District boundaries because owners of the lands had not subscribed them into the Association, including 1,245 acres in the North Tempe area, 20,636 acres in the Salt River Indian Reservation, 7,720 acres in the South Chandler Water Conservation District, and 5,420 acres in the Peninsula-Horowitz and Maricopa Garden Farms area. Approximately 9,136 acres of land otherwise within the exterior boundaries of the District were excluded because they were townsite lands not eligible for reclamation project stored and developed water. (In addition to this, there are 480 acres in the City of Tempe entitled only to normal flow water, which are treated the same as townsite lands.)

F. Water Functions of the District

39. A comprehensive adjudication of water rights within the reservoir district was handed down by the District Court for the Third Judicial District of the Territory of Arizona on March 1, 1910, in the case of *Hurley v. Abbott* (the Kent Decree). Under that Decree, the normal flow of the river was found to have been appropriated to approximately 151,000 acres of land, and those vested water rights were confirmed. Rights to share in the additional water stored and developed by the reclamation project are shared equally among all land subscribed to Association membership. Lands not subscribed to Association membership have no right to share in reclamation water, and are limited to receipt of the normal flow water appropriated before the Kent Decree. The Kent Decree remains the governing determination of surface water rights in the Salt River reclamation reservoir district.

40. All surface water rights in the Salt River Project are appurtenant to the land under Arizona water law or proportionate to the land under federal reclamation statutes and the Articles of the Association. Rights to stored and developed water above the normal flow of the river are divided equally among all acres of Association (and District) land.

41. The water which the Association, as agent for the District, delivers to municipalities is, first the vested water rights of the municipality itself and of land owned by the municipality, and, second, the appropriated and stored and developed water appurtenant to or allocated to District or townsite lands within the corporate limits of the municipality and which the owners have not sought to have delivered directly by the Association. By contract the municipalities receive appropriated and stored and developed water which is appurtenant to or allocated to city land as agent for the owners of the land to which said waters are appurtenant or allocated; the city then pays on behalf of the landowners the assessments and water charges chargeable to the owners of the land. The cities then assume the responsibility to deliver the water to the lands entitled to receive it. Landowners may still receive from the Association (at the high point of the quarter section in which the land is located) any and all waters to which their land is entitled, although some landowners find it more convenient to accept delivery of their water through the cities. Since the municipalities take water from the Association either as appropriators or as agents for the landowners and in proportion to the water rights of the landowners, the assessments and charges made to municipalities for water delivered to them are the same as the assessments and charges made to other landowners for the delivery of their water. (Water trades are sometimes made for the convenience of the parties in which District water is used outside the District in exchange for which an equal amount of non-District water is brought into the District.)

Water is fungible. If the cities receive water from sources other than the District and mix it with District water, the water actually delivered by the cities to the landowners may not be able to be distinguished as to the sources from which it came.

42. The District provides water to eight cities in Maricopa County for municipal use. During 1974 the District provided water as follows:

City	Acre-feet from SRP	Percent from SRP
Chandler	707	14%
Gilbert	304	35%
Glendale	9,995	68%
Mesa	3,313	15%
Peoria	764	81%
Phoenix	122,974	61%
Scottsdale	2,471	40%
Tempe	19,814	92%
	160,342	59%

In 1975 these eight cities and towns paid a total of $620,699.85 to the Association in water assessments and delivery charges.

43. The landowning and acreage voting requirements of the Association and the District are intended to allocate to land and water interests the control of the affairs of the Association and the District, in proportion to the varying amounts of water rights and financial burdens borne by the various voters, because of the following considerations: (1) The acreage lien for general obligation bonding, A.R.S. §45-1047, (2) The acreage taxing power under A.R.S. §45-1011, *et seq.* (which has thus far not had to be used), (3) The Associations's acreage assessments for water, and, (4) The land proportionate basis of stored and developed water rights under federal reclamation law and the Articles of Incorporation of the Association and the somewhat land proportionate basis of appropriated water usage.

44. The District and the Association now service the water rights of 238,269.90 assessed acres of land. Normal flow water rights of some non-member lands, as established in the Kent Decree, are also served. The reclamation system has a 2,072,050 acre feet storage capacity in six reservoirs, and an 812,506 acre-feet groundwater pumping capacity. The water is distributed by 131 miles of major canals, 875 miles of laterals and 263 miles of drainage or waste ditches. The Association and the District administer the water rights established in the Kent Decree.

45. During the last ten years about 83% of the water system costs have been financed with power revenues. In 1974, revenues from water and irrigation activities were $2,613,184. The expenses, including depreciation, for irrigation and water operations exceeded revenues by about $14,000,000, and that deficit was met from power revenues. Water support has averaged approximately $10,000,000 annually since 1965. These amounts do not include expenditures for additions and improvements to the irrigation plant for repayment of long-term debt, which must also be met from power revenues. Any decrease in support from power revenues would have to be met from increased water delivery charges.

G. Power Function of the District

46. The District serves approximately 240,000 electric customers, of which approximately ninety percent (90%) are residential customers. Approximately 85% of the District's electric customers reside within the geographic boundaries of the District. A detailed summary of the District's electric operations is contained in Exhibit K which is a copy of the Official Statement for 1976 Series A Revenue Bonds. During 1974 revenues from the sale of electricity were $168,057,000 or ninety-eight percent (98%) of total revenues.

The District provides a reliable supply of essential electric energy and water in substantial portions of the Salt River Valley; thus, the District operation is important to the development of the Salt River Valley.

47. The District does not, and is not required to, serve electricity to all member lands; and it serves large areas outside of its boundaries. In 1955 the Arizona Corporation Commission and the Secretary of Interior approved an agreement between Arizona Public Service Company and the District establishing the service territories of each. Generally speaking, Arizona Public Service Company serves electricity to approximately 15% of the District area. The agreement resulted in (i) continuance of service by District to rural areas then served by it, even though such areas were later annexed by the cities in which APS was serving, (ii) the District withdrawing from retail service in certain areas and the assumption of service by APS, and (iii) APS agreeing to purchase from District at wholesale, the power requirements necessary to supply the retail sales in the areas where the District discontinued service.

48. By its Articles of Incorporation, the Association is obligated to compensate shareholders who pay substantially more for electricity used on Association land and purchased from public service corporations for domestic and ordinary farm purposes than shareholders who purchase electricity directly from the Association. By its contract of 1937, as amended, the District has assumed this contractual obligation of the Association to resident landowners. The District has on one occasion in the past discharged this contractual obligation of itself and of the Association to compensate District landowners for the difference in electricity costs between what they have paid public service corporations and what they would have paid the District for equivalent kinds of electric service.

H. Financing of the Salt River Project by the District and the Association

49. The District's long-term debt consists of General Obligation Bonds and Electric System Revenue Bonds. General Obligation Bonds outstanding are portions of eleven different issues sold between 1950 and 1972. All General Obligation Bonds were and are guaranteed by the Association.

Original amounts of outstanding issues	$358,970,000
Amounts paid at maturity	52,510,000
Bonds reacquired and cancelled	1,830,000
Bonds refunded	13,470,000
Total Outstanding	$290,980,000

These bonds are secured by a lien on all taxable real property within the District's boundary. The outstanding principal represents a potential tax totaling $1,221.25 per acre, not including the interest requirements. Outstanding General Obligation Bonds are not scheduled to be retired until 2003. Revenue Bonds outstanding totaling $600,000,000 were sold between 1973 and 1976. The first principal maturities come due in 1976. These bonds are secured by a pledge of revenues. Their lien on revenues is junior to the lien of the General Obligation Bonds.

50. Before the District began financing the Association, bonds were issued in six issues totaling $12,683,000. These bonds were sold at various dates between February 1, 1923 and November 1, 1938. The final maturity of Association bonds was in 1958. All these bonds were either paid at maturity out of Association revenues or refunded by District bonds. In addition, there were three issues of Agricultural Improvement bonds totaling $2,343,000. These were sold between May 1924 and February 1925. The Association guaranteed payment and in two cases pledged specific electric revenues to guarantee payment. Drainage District bonds totaling $125,000 were assumed as a general obligation of the Association on October 24, 1924.

51. In addition to the District bond issues summarized in paragraph 48, between 1938 and 1948 the District borrowed $24,371,000 in five bond issues which have been entirely repaid or refunded. Of that amount, $10,905,000 was borrowed to refund past indebtedness. All these debts were guaranteed by the Association. The last of these bonds were retired by July 1, 1975.

52. In addition to the original interest-free construction and acquisition funds which were repaid by 1955, since 1950 the United States has advanced to the Association $21,950,470 in interest-free loans for rehabilitation and betterment of project facilities, of which $10,881,063 has not yet been repaid to the government. Rehabilitation and betterment of the project works is being accomplished under the authority of the Act of October 7, 1949 (63 Stat. 724) as amended.

53. The current financial condition of the District as of December 31, 1974 is as reflected in the attached 1974 annual report (Exhibit L), pages 11 through 19. The current operations and activities of the District are as reflected in the attached 1975 annual statement, pages 20 and 21.

54. In summary, the plant investment per assessed acre of the District as of the end of 1974 was approximately $3,500.

55. Because of the past and continuing substantial investment for the development, storage and distribution of water to the Association and Distric lands, said lands have been assured of a reliable supply of water at a reasonable cost for the indefinite future. Because of the assurance of this indefinite supply of water, the assessed valuation of agricultural lands within the District and the Association is generally twice the assessed valuation of comparable agricultural lands outside the boundaries of the District and the Association.

56. Viewed as a percentage of gross power revenues, the amount of District power revenues utilized to meet water costs is approximately equivalent to the dividends paid to common stockholders in comparable electric utility companies.

I. District Tax Payments

57. Since 1963 the District has been authorized to make voluntary contributions in lieu of property taxes by A.R.S. § 45-2201 *et seq.* (1975 Supp.). These contributions are based on the value of property used by the District for the generation, transmission and distribution of electrical energy and upon the same assessment percentage applicable to utilities. In substance, the electrical facilities of the District are taxed the same as privately owned electric utility property.

58. Tax payments by the District in the last ten years include the following:

	Voluntary Payments in Lieu of Property Taxes	Ad Valorem Property (N.M., Nev. & Colo. Taxes)	Sales	Payroll	Total
1966	1,903,255		1,166,673	558,288	3,628,216
1967	2,675,989		1,246,953	624,552	4,547,494
1968	1,542,336	5,724	1,876,763	731,251	4,156,074
1969	4,506,785	76,068	2,442,366	849,600	7,874,819
1970	4,175,409	228,718	2,772,673	936,233	8,113,033
1971	5,490,727	371,813	3,175,105	1,075,409	10,113,054
1972	6,253,502	430,766	3,860,503	1,210,581	11,775,352
1973	6,644,077	411,427	2,703,628	1,753,523	13,512,655
1974	12,149,751	516,588	6,382,393	2,220,780	21,269,512
1975	16,621,310	(	—Not Available—		)
Total	61,963,141				

IV. MISCELLANEOUS

59. The secretary of the interior has comprehensive power under Federal reclamation statutes and the contracts between the United States and the Association and the District to supervise the District and the Association's

management of the Salt River Project, including the power operations. 43 U.S.C. § 498, 499, 500. The Secretary has never revised rates set by the District.

60. Although the District has an obligation to continue to use electric revenues to reduce the cost of water delivery, the precise amount of the subsidy is not fixed. District electric customers (particularly those who are not water users) might want to reduce the amount of the subsidy, whereas farmers, ranchers and others who economically benefit from less expensive water would undoubtedly oppose any substantial reduction in the subsidy level. Therefore, should the voting constituency of the District be changed as requested by plaintiffs, conflicts in the joint conduct and management of the water and electric operations would probably result between the District and Association which could interfere with the present harmony of operation. This would make it more difficult to borrow funds and would increase interest rates. An initial change in composition of the District Board of Directors would, because of concern in the financial community about instability of management, result in greater difficulty and higher cost of borrowing capital funds. It would be difficult to predict the long-range effects of such change.

61. The District has operated and continues to operate an "area development function" which responds to inquiries from firms considering locating offices in Phoenix. District area development people have worked with the following firms which have located in the Valley: Sperry Information Display Systems, Greyhound Corp., Capitol Foundry, Applied Materials, Digital Equipment, G. D. Searle, Co., Data Packaging, Motorola, Revlon, Marathon Steel, Honeywell, Rogers Corp., Talley Industries, Western Electric, Siemens, and General Instruments.

62. There are approximately 326 miles of transmission lines, 2,570 miles of overhead distribution lines and 1,124 miles of underground distribution lines located within the District's geographical boundaries. The District has 4 gen-

erating stations, 9 bulk power receiving stations, 64 residential distribution stations and 15 industrial distribution stations located within the District.

63. There have been occasional protests concerning the presence and location of power lines and towers.

64. The Salt River, which runs through the District's geographical area, is normally dry, but occasionally flows as a result of heavy runoffs from storms over which the District has no control. The occasional major quantities of water which have flowed in the Salt River in the last decade have been the result of sheet runoff into the river below Granite Reef Dam and releases from reservoirs operated by the District. The District has control of the reservoir outlets, but no control over the amount of water which flows from the Salt and Verde Rivers and Tonto Creek and various washes and creeks into the reservoirs or inflows into the canal system and Salt River below Granite Reef Dam. During the months of December 1965, and January, February and March of 1966, 551,504 acre-feet of water were released into the Salt River below Granite Reef. The water in the Salt River in 1965 destroyed or damaged all principal SRP transmission lines crossing the river, and it was reported that over 2,000 people temporarily left their homes. Service outages affected no more than 20% of the SRP service area, although approximately 30-40% of the then current electric load was involved to some degree. The remainder of the SRP electric service area was not affected in any significant way by the water.

During 1973, the District released 1,239,506 acre-feet of water from its reservoirs to accommodate heavy runoffs from watersheds. The releases of water in 1973 and 1965-66 were necessary because the reservoirs had reached a point beyond which they could not safely be filled further. The Bureau of Reclamation was kept informed of and concurred in the decisions to release water on both occasions.

On September 4, 1970 a rainfall of 100 year return frequency occurred in the watershed which is contributory to the Arizona Canal and Pima Road intersection in Scottsdale, Arizona. The Arizona Canal overflowed at that location, carrying sheet runoff, contributing to the flooding of homes located in subdivisions south of the canal, and it was reported that flood damage affected 1,000 homes. Owners of 220 flood-damaged homes brought suit against the Association and the District; total damages from the flood were agreed to be $720,345.45, although the Association and the District contest any liability on their part, and the District was dismissed from the suit by directed verdict.

The Arizona Canal and all other Project canals and ditches are intended and designed for irrigation; they are not flood control devices and were never intended as such. *Ramada Inns, Inc. v. Salt River Valley Water Users' Association,* 111 Ariz. 85, 88, 523 P.2d 496 (1974). Irrigation canals are designed and built entirely differently from flood control canals. Arizona statutes do not allow the District to engage in flood control functions. *Cf.* A.R.S. § 45-903 (1956). Federal Reclamation statutes do not allow the District to alter irrigation distribution facilities so as to accommodate natural runoff. 43 U.S.C.A. § 421 A (1975 Supp.) Nor may the District make major changes in Project facilities without the consent of the Bureau of Reclamation.

Any flood control benefits of the District's activities are only those naturally incident to the impoundment of water from natural water courses and the carrying capacity of the canals at any given time. The District may not under State or federal laws sacrifice its irrigation purposes to achieve flood control ends.

The Maricopa County Flood Control District and the Army Corps of Engineers are the state and federal agencies charged with flood control in the Salt River Valley.

65. The following documents and contracts attached hereto and designated Exhibits A through J, submitted by defendants, are true, accurate, authentic and complete copies of the documents which they purport to be; all facts recited in any such documents are true as of the dates of the documents in which they are recited; it is further stipulated that all legal rights, duties, liabilities, and relationships which the following documents purport to create or establish are true, valid, and binding according to the terms of said documents.

Exhibit A. Articles of Incorporation of the Salt River Valley Water Users' Association, as amended through April 4, 1972.

Exhibit B. Contract of June 25, 1904 between the Association and the United States.

Exhibit C. Contract of September 6, 1917 — Agreement providing for transfer of care, operation and maintenance of the Salt River Project to the Association.

Exhibit D. Contract of July 26, 1922 between the Association and the United States — Supplemental Agreement to 1904 and 1917 Agreements.

Exhibit E. Contract of April 25, 1928 between the Association and the United States — Amended and Supplemental to July 26, 1922 Agreement.

Exhibit F. Contract of November 26, 1935 between the Association and the United States — contract providing for construction of Bartlett Dam and repairs to project works.

Exhibit G. Contract of October 14, 1936 between the Association and the United States — supplemental to November 26, 1935 contract.

Exhibit H. Contract of March 22, 1937 as amended on February 28, 1944 and September 12, 1949 between the Association and the District approved by the United States transferring property of the Association to the District and delegating from the Association to the Dis-

trict the operation of the Salt River Project, with the Association retaining the irrigation functions of the project.

Exhibit I. Contract of June 30, 1950 between the Association and the United States amending the contract of September 6, 1917.

Exhibit J. Resolution of Maricopa County Board of Supervisors establishing Salt River Project Agricultural Improvement and Power District dated January 25, 1937.

66. The factual and statistical date contained in the following documents submitted by defendants are true as of the date of each document.

Exhibit K. Official statement for 1976 Series A Revenue Bonds, dated January 22, 1976.

Exhibit L. Salt River Project Annual Report 1974.

Exhibit M. Salt River Project Annual Report 1973.

Exhibit N. Salt River Project Annual Report 1972.

Exhibit O. Salt River Project Annual Report 1971.

Exhibit P. Salt River Project Annual Report 1970.

67. The following document, offered by plaintiffs, attached hereto and designated Exhibit Q, is a true, accurate, and complete copy of the document which it purports to be:

Exhibit Q. March 18, 1969 resolution of the Board of Directors of the District endorsing a change in District elections which would allow voting on a fractional acreage basis.

68. The factual and statistical data contained in the following documents, offered by plaintiffs, attached hereto and designated Exhibits R, through W, are true:

Exhibit R. Breakdown of voting in District elections for the officers of director, president and vice president for 1970, 1972 and 1974.

Exhibit S. Summary of water usage and water charges for the directors of the District during 1974.

Exhibit T. Biographical data of the District directors.

Exhibit U. Acreage and eligible votes in each of the ten (10) divisions of the District.

Exhibit V. Management's recommendation: Proposed Rate Increase, dated June 2, 1975.

Exhibit W. Formal presentations made at special Board meeting of the District, dated July 30, 1975.

69. Defendants offer the following maps, designated Exhibits X, Y and Z attached hereto, which are true and accurate representations of the areas they purport to represent:

Exhibit X. Salt River Project Agricultural Improvement and Power District, Eligible Voting Lands (1974).

Exhibit Y. Salt River Valley Water Users' Association, Eligible Voting Member Lands (1974).

Exhibit Z. Salt River Project Service Area (electricity) (1976).

FIRST SUPPLEMENT TO STIPULATED STATEMENT OF FACTS

70. Subject to the qualifications explained in this paragraph, the relative urban and agricultural land uses in the District in selected years were as follows:

Year	Agricultural	Urban
1937	229,460	13,500
1947	228,475	14,650
1957	199,960	39,441
1970	151,946	86,318
1971	146,005	92,259
1972	138,724	99,540
1973	132,774	105,490
1974	125,741	112,523
1975	124,452	113,812

These data were generated under a system devised by the District. The land use change has averaged 1% per year since 1937, although in the early 1970's the rate of change was higher due to circumstances of unusual economic growth. The rate of change in 1975 was 0.5%. The figures given do not purport to reflect actual land use. The figure for urban use include land actually put to urban use, land put to non-commercial agricultural use (crops or livestock used by owner rather than marketed), and vacant land held for speculation. Vacant land is classed according to the predominant surrounding use, except that it is sometimes assumed that vacant land in rural areas but in the urban growth pattern is held for speculation if owned by corporations, so such land is sometimes classed as urban.

71. Water assessments and delivery charges were recently increased to produce an additional $1,055,000 in water revenues. Mandatory acreage water assessments were increased 30%; delivery charges for additional normal flow and stored and developed water were increased 88%.

72. Plaintiff DWIGHT BRAHS purchases electricity from the District. Between March 1975 and February 1976, his average monthly bill was $27.26; his lowest bill was $18.39, and his highest bill was $34.83. Plaintiff ROLAND JAMES owns and operates a 16-unit apartment building; he purchases electricity from the District for each of the apartment units. Between March 1975 and February 1976, the average monthly bill for these 16 units was $292.29, the lowest bill was $205.91, and the highest bill was $410.95.

73. In April 1974, approximately 359,601 persons owned parcels of land within the District eligible to be voted if those persons were otherwise qualified electors of the State of Arizona. It cannot be determined how many of those 359,601 persons were qualified electors of the State of Arizona and therefore were eligible to vote their land in the District election.

74. During 1976, it is estimated that 25% of all water deliveries by the Association will be to cities. These deliveries are of water either owned by the cities or which landowners in the cities have allowed the cities to accept from the District on behalf of the landowners. Another 15% of water delivered by the Association will be used by its owners (the landowners) in non-agricultural but predominantly irrigation uses, including parks, playgrounds, schools and subdivision irrigation. The balance of the water delivered by the District will be used by its owners in agriculture.

75. As is indicated in paragraph 41 of the Stipulated Statement of Facts, eight Valley cities, pursuant to contract with the Association, accept delivery from the Association of some water which is appurtenant to or allocated to land within the cities. Those cities take delivery of the landowners' water as agents for the landowners. The cities accept delivery only of water which the individual landowners designate to be delivered to the cities as their agents. The cities then act as agents of the Association for the collection of taxes, assessments, and other charges on all Salt River Project lands within the cities, and they guarantee the payment of such charges to the Association. Although the practice may vary from city to city, presently the City of Phoenix pays the assessments and charges on behalf of the landowners from city water revenues, and the landowners then allow the city to use their water without receiving further compensation from the city for their water. The exact number of acres for which the landowners have designated each city to accept delivery of water is variable since such a designation, once made, may be changed. As of December 31, 1975, landowners were allowing the cities to accept delivery of water belonging to the following numbers of acres of District land:

Phoenix	45,751.95
Tempe	10,107.75
Peoria	513.85
Glendale	5,393.35
Gilbert	804.55

Scottsdale	1,657.10
Mesa	1,513.25
Chandler	785.25

76. Arizona Public Service Company and Tucson Gas & Electric Company are the first and third largest electric utilities in the State of Arizona. They are both investor-owned private corporations. Of the eight cities in the District, only Mesa serves electrical energy to its citizens.

77. Mr. and Mrs. WILLIAM P. SCHRADER currently own 0.22 acres of land in the District.

78. The cost to the District of holding an Association election alone is not significantly less than the cost of holding an Association election and a District election together.

79. Attached hereto and designated Exhibit AA is a true, accurate, authentic and complete copy of the contract under which the City of Phoenix delivers some water to the City as agent for some landowners. It is agreed that the contracts under which the Association delivers some water to Scottsdale, Tempe, Mesa, Peoria, Glendale, Gilbert and Chandler do not vary materially from the terms of Exhibit AA.

80. The share of agricultural water subsidy of the average residential power customer of the District in 1975 was approximately $9.47, and the residential water subsidy was approximately $4.81. Using figures most recently available (1974), the average subsidy per acre-foot of water was $14.03. The average cost for 5 acre-feet of water in 1974 was $22.50. The full cost of the same amount of water without any assistance would be $101.15.

81. Attached hereto and designated Exhibit BB is a map which depicts the land uses within the District and surrounding areas as of 1970. (This map was prepared by the Maricopa Association of Governments.)

SECOND SUPPLEMENT TO STIPULATED STATEMENT OF FACTS

82. Presently all eight cities which accept delivery of water on behalf of landowners pay the assessments and charges on behalf of the landowners from city water revenues.

83. The average subsidy per acre-foot of water for the following years was as follows:

1974	$14.03
1973	8.02
1972	15.32
1971	13.60
1970	12.65

84. The share of agricultural water subsidy and residential water subsidy of the average residential power customer, assuming those subsidies are met from no other power revenues, of the District in the following years was as follows:

Year	Agri. Assist.	Res. Assist.
1975	$ 8.89	$5.22
1974	12.06	7.39
1973	11.35	4.41
1972	17.31	8.92
1971	17.03	7.65
1970	19.12	7.81

In fact, the share of subsidy borne by residential power users is less because all power customers share some portion of the support.

85. On the average, about 5.3% of the agricultural land in the District lies fallow or idle. Various crops consume differing amounts of water per acre. For example, alfalfa hay consumes a seasonal use of 74.3 inches of water per acre; cotton consumes 41.2 inches; cereals generally consume less than 25.5 inches and lettuce 8.5 inches of water per acre. These crops, among others, are grown on District lands.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CIVIL ACTION FILE No. 75-498 PHX WEC

ROLAND W. JAMES, et al., Plaintiffs, vs. GERMAIN H. BALL, et al., Defendants.	JUDGMENT [Filed March 17, 1976]

This action came on for (hearing) before the Court, Honorable Walter E. Craig, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiffs take nothing and that the action is dismissed.

Dated at Phoenix, Arizona this 17th day of March, 1976.

W. J. FURSTENAU, Clerk

By Phyllis L. Martin
Deputy Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROLAND W. JAMES, et al., Plantiffs, vs. GERMAIN H. BALL, et al., Defendants.	No. CIV 75-498 PHX WEC JUDGMENT [Filed March 17, 1976]

This cause came on to be heard on March 17, 1976 on Plaintiffs' and Defendants' Cross-Motions for Summary Judgment filed February 24, 1976. Pursuant to Rule 11(h), Rules of Practice of the United States District Court for the District of Arizona, the parties filed a stipulation on February 24, 1976 setting forth a Statement of the Stipulated Facts, later supplemented by similar stipulations filed on March 10, 1976 and March 16, 1976. Plaintiffs' Motion for Summary Judgment, filed February 24, 1976, also prays for certification of this action as a class action under Rule 23(b) (2), Federal Rules of Civil Procedure.

The Court has considered the several motions and the arguments of counsel, and the Stipulated Statement of Facts of the parties, together with the supplements thereto.

Accordingly, the Court finds that there is no dispute as to any material fact, that the statutes challenged by plaintiffs violate neither the equal protection nor the due process clauses of the Fourteenth Amendment to the United States Constitution, and that as a matter of law the defendants are entitled to summary judgment in their favor and that the Plaintiffs' Cross-Motion for Summary Judgment should be denied.

Therefore, IT IS ORDERED, ADJUDGED and DECREED that:

1. Plaintiffs' request for certification of this action as a class action under Rule 23(b) (2), Federal Rules of Civil Procedure, is denied.

2. Plaintiffs' Motion for Summary Judgment is denied.

3. Defendants' Motion for Summary Judgment is granted.

4. Judgment is to be entered in favor of defendants and against plaintiffs, with costs to be taxed against plaintiffs.

DATED this 17th day of March, 1976.

Walter E. Craig

Judge of the District Court

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROLAND W. JAMES, et al.,
Plaintiffs-Appellants,
v.
GERMAIN H. BALL, et al.,
Defendants-Appellees.

No. 76-1918
ORDER
[Filed February 6, 1980]

Before: CHOY and KENNEDY, Circuit Judges.

The court finds it unnecessary to amend or supplement its opinion by adding further instructions to the district court. The petition for rehearing is DENIED.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES, ROLAND W., et al., Plaintiffs/Appellants, vs. BALL, GERMAIN H., et al. Defendants/Appellees.	No. 76-1918 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES [Filed February 13, 1980]

Notice is hereby given that the Defendants/Appellees, GERMAIN H. BALL, ALEX M. CONOVALOFF, BILL ROUSSEAU, LEO C. SMITH, JOHN M. WILLIAMS, JR., THOMAS P. HURLEY, WILLIAM P. SCHRADER, JOHN S. HOOPES, W. LARKIN FITCH and THOMAS J. FINLEY, in their capacity as members of the Board of Directors, Salt River Project Agricultural Improvement and Power District, and KARL F. ABEL, in his capacity as President of the Salt River Project Agricultural Improvement and Power District, hereby appeal to the Supreme Court of the United States from that portion of the Opinion and Judgment of October 12, 1979, of the United States Court of Appeals for the Ninth Circuit reversing the judgment of March 18, 1976, of the United States District Court for the District of Arizona.

This appeal is taken under 28 U.S.C. § 1254 (2).

DATED: February 12, 1980.

JENNINGS, STROUSS & SALMON

By /s/ Neil Vincent Wake

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111 West Monroe
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Appellees
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[certificate of service
omitted in printing]

No. 79-1740

In The
Supreme Court of the United States
October Term, 1980

GERMAIN H. BALL, et al.,
Appellants,
v.
ROLAND W. JAMES, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Counsel for Appelles

APPEAL DOCKETED MAY 2, 1980
PROBABLE JURISDICTION NOTED OCTOBER 6, 1980.

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Judgment, filed October 12, 1979, in the Court of Appeals	[J.S. App. B-1]
Order Denying Rehearing, filed February 6, 1980, in the Court of Appeals	[J.S. App. E-1]
Notice of Appeal to the Supreme Court of the United States, filed February 13, 1980, in the Court of Appeals	[J.S. App. F-1]

CHRONOLOGICAL LIST OF REVELANT DOCKET ENTRIES

Date *Description*

July 28, 1975—Complaint, filed in U.S. District Court for the District of Arizona

August 18, 1975—Answer

December 29, 1975—Plaintiffs' Application for Convening of Three-Judge District Court, Memorandum

December 31, 1975—Defendants' Motion to Deny Request for Three-Judge Court, Memorandum

February 2, 1976—Hearing had on Plaintiffs' Application for Convening Three-Judge District Court and Defendants' Motion to Deny Request for Three-Judge Court. It is ORDERED that Plaintiffs' Application is denied and Defendants' Motion to Deny Request granted

February 3, 1976—Plaintiffs' Notice of Hearing Motion for Preliminary Injunction on February 27, 1976, at 9:00 a.m.

February 10, 1976—Stipulation and ORDER that parties will file motions for summary judgment by February 24, 1976; that the hearing set for February 27, 1976, is vacated

February 24, 1976—Plaintiffs' Motion for Summary Judgment and Memorandum

February 24, 1976—Defendants' Motion for Summary Judgment and Memorandum

February 24, 1976—Stipulated Statement of Facts

February 24, 1976—Exhibits to Stipulated Statement of Facts filed February 24, 1976

March 10, 1976—First Supplement to Stipulated Statement of Facts

March 11, 1976—Defendants' Motion to Strike and Motion to Continue Hearing on Motions for Summary Judgment and Notice of Hearing on March 12, 1976, at 2:00 p.m.

March 15, 1976—Stipulation and ORDER that the Clerk may add to the exhibits to Stipulated Statement of Facts filed February 24, 1976, and further exhibits designated Exhibits AA and BB filed on March 10, 1976, to be bound together with the previous exhibits filed on February 24, 1976

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES (Continued)

Date *Description*

March 15, 1976—Motion to Strike argued. ORDER newspaper articles are stricken

March 16, 1976—Second Supplement to Stipulated Statement of Facts

March 17, 1976—Minute Entry: Hearing had on Plaintiffs' and Defendants' Motions for Summary Judgment. ORDER: status of this case as a class action is denied. ORDER: Defendants' request for relief by sealing or expunging from the record certain matters heretofore submitted to the court denied. ORDER: Defendants' Motion for Summary Judgment granted and Plaintiffs' denied

March 17, 1976—JUDGMENT that the Plaintiffs take nothing and that the action is dismissed

March 18, 1976—ORDER: that lines 16—18 on page 7, lines 6—10 on page 16, and exhibits 1, 2 and 3 of Plaintiffs' Reply Memorandum in Support of Their Motion for Summary Judgment, and lines 26—32 on page 22 and all of page 23 of Plaintiffs' Memorandum in Response to Defendants' Motion for Summary Judgment and exhibits 1, 2 and 3 to Plaintiffs' Memorandum in Response to Defendants' Motion to Strike and Motion to Continue Hearing be, and hereby are stricken from the record

March 18, 1976—JUDGMENT that Plaintiffs' request for certification of this action as a class action is denied. Plaintiffs' Motion for Summary Judgment is denied. Defendants' Motion for Summary Judgment is granted. Judgment is to be entered in favor of Defendants and against Plaintiffs with costs to be taxes against Plaintiffs.

March 23, 1976—Defendants' Bill of Costs in the amount of $38.00

March 29, 1976—Tax costs in the amount of $38.00

April 7, 1976—Plaintiffs' Notice of Appeal ($5.00 fee paid)

April 7, 1976—Plaintiffs' cost bond on appeal

October 12, 1979—Opinion and judgment of the Court of Appeals for the Ninth Circuit

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES (Continued)

Date *Description*

October 26, 1979—Petition for rehearing

November 27, 1979—Order of the Court of Appeals requesting appellants to file a response to the Petition for Rehearing and directing appellants and appellees to file memoranda addressing the following points: "(1) Is there any significant risk that changes in District policies affecting operations or rates can jeopardize lands which are security for outstanding bonded indebtedness? (2) If future policies of the District might appear to jeopardize such lands, would affected owners have any remedies, under Arizona law or the provisions of outstanding bonds, to require the district to alter such policies? (3) What instructions, if any, should be given to the district court in formulating its decree upon remand? a. Is it appropriate for the district court to request a plan for redemption or early retirement of bonded indebtedness secured by lands, either in conjunction with or as a condition precedent to ordering a change in the District's electoral system? b. Would the district court have the authority to require that the State of Arizona be made a party to these proceedings so that the court can consider requiring statutory enactments to protect landowners against default, either in conjunction with or as a condition precedent to the entry of an order effecting a change in the District's electoral system?"

December 21, 1979—Response to Petition for Rehearing

January 8, 1980—Appellees' Reply Memorandum Pursuant to Order of November 27, 1979.

February 6, 1980—Order denying rehearing

February 13, 1980—Notice of Appeal to the Supreme Court of the United States

May 2, 1980—Jurisdictional Statement filed in the Supreme Court of the United States

October 6, 1980—Probable Jurisdiction noted

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROLAND W. JAMES, MARY FITZSIMONS, JAMES R. FITZSIMONS, DWIGHT M. BRAHS, FRANK SACCO and JOHN H. MAFFEO, on behalf of themselves and their respective classes,

Plaintiffs,

vs.

GERMAIN H. BALL, ALEX M. CONOVALOFF, BILL ROUSSEAU, LEO C. SMITH, JOHN M. WILLIAMS, JR., THOMAS P. HURLEY, WILLIAM P. SCHRADER, JOHN S. HOOPES, W. LARKIN FITCH and THOMAS J. FINLEY, in their capacity as members of the Board of Directors of the Salt River Project Agricultural Improvement and Power District, and KARL F. ABEL, in his capacity as President of the Salt River Project Agricultural Improvement and Power District,

Defendants.

CIV 75-498
PHX WEC
COMPLAINT
[Filed July 28, 1975]

Plaintiffs allege as follows:

I

This is an action for a declaratory judgment and an injunction to redress the deprivation under color of state law of the rights, privileges and immunities of the plaintiffs secured under the Fourteenth Amendment of the United States Constitution. The action arises out of the unlawful

and unconstitutional voting restrictions and qualifications imposed upon the plaintiffs by the defendants who are the directors of the Salt River Project Agricultural Improvement and Power District (referred to herein as the District).

II

This Court has jurisdiction of this action under 28 U.S.C. § 1343 (1970). The action is brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970).

III

This matter is appropriate for determination by this Court under the federal Declaratory Judgments Act, 28 U.S.C. § 2201 *et seq.* (1970). There exists herein an actual controversy calling for a declaration by this Court of the rights and other legal relations of the parties. The plaintiffs have been denied the right and opportunity to participate in District elections on an equal basis with all other qualified electors in the District. The defendants and their predecessors have enforced the unconstitutional voting scheme complained of herein since 1937. The plaintiffs desire and are entitled to participate in District elections with no conditions placed upon the exercise of their franchise. They are informed and believe and thereupon allege that the defendants will continue to enforce the unconstitutional voting system described herein and condition their participation in District elections upon the ownership of property.

IV

Plaintiffs FRANK SACCO and DWIGHT M. BRAHS are citizens and registered voters of the State of Arizona who reside within the geographical boundaries of the District. Each plaintiff has no interest in any real property located within the District. Each of the plaintiffs is substantially and directly affected by actions of the District and the defendants, each has been denied the right to participate in the District's elections and each desires to

exercise his elective franchise in District elections without discrimination and on an equal basis with all other qualified electors in the District. They bring this action on behalf of themselves and all others similarly situated.

V

Plaintiffs ROLAND W. JAMES, MARY FITZSIMONS, JAMES R. FITZSIMONS, and JOHN H. MAFFEO are citizens and registered voters of the State of Arizona residing within the geographical boundaries of the District. Each plaintiff has an ownership interest in a fractional acre of real property located within the District. Each of the plaintiffs is substantially and directly affected by actions of the District and the defendants, their right to vote in District elections has been abridged and debased by the voting system complained of herein and each desires to exercise his or her elective franchise in District elections without discrimination and on an equal basis with all other qualified electors residing in the District. They bring this action on behalf of themselves and all others similarly situated.

VI

This action is brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. It is proper that this matter be brought as a class action since: (1) each class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to each class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of each class; and (4) the representative parties will fairly and adequately protect the interests of each class. The defendants have acted and refused to act on grounds generally applicable to each class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to each class as a whole.

VII

Defendants GERMAIN H. BALL, ALEX M. CONOVALOFF, BILL ROUSSEAU, LEO C. SMITH, JOHN M. WILLIAMS, JR., THOMAS P. HURLEY, WILLIAM P. SCHRADER, JOHN S. HOOPES, W. LARKIN FITCH and THOMAS J. FINLEY are members of the Board of Directors of the District. Defendant KARL F. ABEL is President of the District. Pursuant to A.R.S. § 45-934 (1956), the defendants are authorized to establish and enforce rules and regulations of the District and to manage and conduct its business and affairs. They are responsible for enforcing the unconstitutional voting scheme complained of herein.

VIII

The District is organized under the Constitution and laws of the State of Arizona. CONST. Art. 13 § 7; A.R.S. § 45-901 *et seq.* (1956) (1974 Supp.) It is an agricultural improvement district and deemed a political subdivision of the State with all the rights, privileges, benefits, immunities and exemptions granted municipalities and political subdivisions under the laws of the State of Arizona.

IX

The District is the second largest provider of electric service in the State of Arizona serving approximately 240,000 residential, commercial, industrial and agricultural power users in its 2,900 square mile service area in three Arizona counties. The Phoenix metropolitan area containing approximately 50% of the State's population is located within the District. The District estimates that its electric revenues will be approximately $200 million in 1975, or approximately 98% of its total revenue.

X

In accordance with Arizona law, the District possesses certain powers and exemptions, including but not limited to the following:

(1) Exemption from regulation by the Arizona Corporation Commission, except that the Commission must authorize the issuance of revenue bonds, A.R.S. § 45-1065 (1974 Supp.) and approve power line transmission sites, A.R.S. § 40-360.03 (1974);

(2) Power to exercise right of eminent domain and to bring condemnation proceedings, A.R.S. § 45-939 (1956);

(3) Right of entry upon any land for any reason necessary to carry out the purposes of the District, A.R.S. § 95-940 (1956);

(4) Power to sell bonds, A.R.S. § 45-1041 *et seq.* (1956) (1974 Supp.) and

(5) Power to raise revenue through the levy of taxes on all real property located within its geographical area, § 45-1011 *et seq.* (1956).

XI

Plenary power to control and manage the affairs of the District and to carry out and execute the above-mentioned powers is granted by statute to the eleven member Board of Directors. The Board's powers include but are not limited to: the power to manage and conduct the business and affairs of the District; to make and execute all necessary contracts; to establish and enforce by-laws, rules and regulations necessary to carry on the business of the District; to acquire lands, easements and other property necessary or required for the uses and purposes of the District; to construct, maintain, operate and keep in repair all works and other property acquired and used for the District; and to exercise all powers of the District relative to the right of eminent domain and condemnation.

XII

Every two years, those eligible to vote in District elections choose the members of the Board of Directors. The franchise is restricted to those who are otherwise qualified

to vote and who are the "owner[s] of record of real property located within the boundaries of the district as of sixty days preceding a district election, and on which he has been assessed for county taxes . . . ." A.R.S. § 45-909 (1974 Supp.)

XIII

Under the acreage system of voting adopted by the District "each landowner possessing the qualifications of an elector shall be entitled to cast one vote . . . for each acre of land within the district owned by him." A.R.S. § 45-938B (1974 Supp.) Furthermore, those who own "less than one acre of land within the district shall be entitled to a fractional vote . . . equal to the fraction of an acre owned by such elector." A.R.S. § 45-983C (1974 Supp.)

XIV

Pursuant to the foregoing restricted system of voting, the defendants have adopted, implemented and enforced policies and procedures which burden, debase, restrict and deny the voting franchise in District elections of those who do not own real property in the District and those who own fractional acres of real property.

XV

By conditioning the right to vote of the plaintiffs and members of their respective classes upon property ownership, the defendants have denied them, under color of state law, rights protected under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The restrictions on voting created by the statutes referred to herein establish classifications affecting fundamental rights absent any compelling or important state interest.

XVI

The District is engaged in the performance of important governmental functions and its conduct and actions affect the plaintiffs and members of their respective classes in important and substantial ways including but not limited to

their purchase and use of electricity provided by the District, flood control, the environmental and health consequences of the District's actions and the District's impact on the economy of its geographic area.

XVII

Plaintiffs have no adequate remedy at law since money damages cannot fully compensate them for the loss of their elective franchise complained of herein and plaintiffs will suffer and have suffered irreparable injury for the unconstitutional deprivation of their rights, privileges and immunities.

WHEREFORE, the plaintiffs demand judgment against the defendants, their successors, agents, servants and employees as follows:

(1) That a three-judge court be convened pursuant to 28 U.S.C. §§ 2281, 2284 (1970) to hear and determine this action;

(2) That pursuant to the federal Declaratory Judgments Act, 28 U.S.C. § 2201 *et seq.* (1970), this Court declare that A.R.S. §§ 45-909, 983 (1974 Supp.) violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution; and that this Court further declare A.R.S. § 45-981B (1956) which establishes voting districts based upon acreage violates the Fourteenth Amendment of the United States Constitution;

(3) That this Court preliminarily and permanently enjoin and restrain the defendants from adopting, implementing and/or enforcing any system of voting in District elections based upon ownership of real property or upon any other qualification other than as required by A.R.S. § 16-101 (1974 Supp.);

(4) That this Court award plaintiffs' reasonable attorneys' fees and their costs incurred therein;

(5) That this Court grant such other and further relief as it deems just and proper.

DATED this 27th day of July, 1975.

/s/ Bruce Meyerson

Bruce Meyerson
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Attorney for Plaintiffs

[Verifications omitted
in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROLAND W. JAMES, *et al.*, Plaintiffs, vs. GERMAIN H. BALL, *et al.*, Defendants.	CIV 75-498 PHX WEC ANSWER [Filed August 8, 1975]

COME NOW the Defendants GERMAIN H. BALL, ALEX M. CONOVALOFF, BILL ROUSSEAU, LEO C. SMITH, JOHN M. WILLIAMS, JR., THOMAS P. HURLEY, WILLIAM P. SCHRADER, JOHN S. HOOPES, W. LARKIN FITCH and THOMAS J. FINLEY, in their capacity as members of the Board of Directors of the Salt River Project Agricultural Improvement and Power District, and KARL F. ABEL, in his capacity as President of the Salt River Project Agricultural Improvement and Power District, by and through their undersigned attorneys, and for their answer to plaintiffs' Complaint, admit, deny and allege as follows:

I.

Plaintiffs' Complaint in its entirety, and in the alternative each separate cause of action, fails to state a claim against defendants upon which relief can be granted.

II.

The Court lacks jurisdiction over the subject matter insofar as the named plaintiffs and their respective classes are concerned, in that they can exhibit no constitutionally protected right which has been denied by defendants under color of state law.

III.

Defendants deny that they are properly-named defendants to this form of action.

IV.

Defendants deny each and every, all and singular, the allegations of plaintiffs' Complaint not expressly and specifically admitted herein.

V.

Answering Paragraph I of the Complaint, defendants admit that by certain allegations therein the plaintiffs attempt to invoke the Fourteenth Amendment of the United States Constitution. However, defendants deny the presence of the requisite need for injunctive and declaratory relief, of any action under color of state law or of any deprivation of protected rights, privileges and immunities. Defendants admit that they are the Directors of the Salt River Project Agricultural Improvement and Power District (referred to herein as the "District"), but deny that Defendant KARL F. ABEL has been sued in that capacity. Defendants deny each and every other or different allegation in Paragraph I of plaintiffs' Complaint.

VI.

Answering Paragraph II of plaintiffs' Complaint, defendants allege that, although this action is purportedly brought under the Civil Rights Act of 1871, this Court does not have jurisdiction of this action under 28 U.S.C. § 1343.

VII.

Answering Paragraph III of plaintiffs' Complaint, defendants allege that this matter is not appropriate for determination under the federal Declaratory Judgments Act, 28 U.S.C. § 2201, *et seq.* (1970), that there is no justiciable controversy, that defendants have not enforced any voting scheme or statute, that plaintiffs have not been denied any rights by these defendants, and that elections for the directors of the District will be carried out within the parameters of the law. Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegation that plaintiffs desire to participate in District

elections with no conditions place upon the exercise of their franchise. Defendants deny each and every other or different allegation contained in Paragraph III of plaintiffs' Complaint.

VIII.

Answering Paragraphs IV and V of plaintiffs' Complaint, defendants deny that these plaintiffs have been denied any right to vote in the District's elections. Defendants are without information or knowiedge sufficient to form a belief as to the truth of the remaining allegations in Paragraphs IV and V of plaintiffs' Complaint and, therefore, deny the same.

IX

Answering Paragraph VI of plaintiffs' Complaint, defendants allege that they are without information or knowledge sufficient to form a belief as to the truth of some of the allegations about the plaintiffs and therefore deny that this purported class action is proper or that it fulfills the requisites of Rule 23 of the Federal Rules of Civil Procedure.

X.

Answering Paragraph VII of plaintiffs' Complaint, defendants admit the first, second and third sentences thereof. Defendants deny the fourth sentence of Paragraph VII of plaintiffs' Complaint and allege that they do not enforce any voting mechanism.

XI.

Defendants admit the allegations in Paragraph VIII of plaintiffs' Complaint.

XII.

Answering Paragraph IX of plaintiffs' Complaint, defendants admit the allegations therein, but add that only a part of the Phoenix Metropolitan area is located within the District, and not all electric users in the Metropolitan area or even the District area are served by the District.

XIII.

Answering Paragraph X of plaintiffs Complaint, defendants allege that, within certain limitations, restrictions and regulations, the District generally possesses particular powers and exemptions such as those set forth in A.R.S. §§ 45-1065, 40-360.03, 45-939, 45-940, 45-1041, *et seq.*, and 45-1011, *et seq.*

XIV.

Answering Paragraph XI of plaintiffs' Complaint, defendants admit that the Arizona statutes, within certain limitations, restrictions and regulations, grant the members of the Board of Directors of the District the power to control and manage its affairs and to carry out and execute certain powers such as those enumerated in said Paragraph XI of plaintiffs' Complaint.

XV.

Answering Paragraph XII of plaintiffs' Complaint, defendants admit the allegations in the first sentence thereof and further allege that the election of the Board of Directors of the District is in accordance with A.R.S. § 45-909.

XVI.

Defendants admit the allegations in Paragraph XIII of plaintiffs' Complaint.

XVII.

Answering Paragraph XIV of plaintiffs' Complaint, defendants deny each and every allegation therein and allege that the phrases "enforced", "burden" and "debase" should be stricken therefrom as redundant, immaterial, impertinent, scandalous and prejudicial.

XVIII.

Defendants deny each and every allegation in Paragraph XV of plaintiffs' Complaint.

XIX.

Answering Paragraph XVI of plaintiffs' Complaint, defendants allege that they are engaged in the functions authorized by the Arizona Constitution and law, specifically including Article 13, Section 7, of the Constitution, and the provisions of A.R.S. § 45-901, *et seq.*, and including those functions heretofore admitted. Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations that defendants' conduct and actions affected these plaintiffs and the members of their particular classes.

XX.

Defendants deny each and every allegation of Paragraph XVII of plaintiffs' Complaint.

XXI.

Defendants do not agree that it is appropriate to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 because plaintiffs have not demonstrated, and defendants believe plaintiffs cannot provide, the requisite showing for injunctive relief restraining the enforcement, operation or execution of a state statute by restraining the action of an officer of the state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under said statutes on the grounds of the unconstitutionality of such statute.

XXII.

Defendants deny that plaintiffs are entitled to a preliminary injunction in this case.

WHEREFORE, defendants pray that plaintiffs' Complaint be dismissed and all relief requested thereunder be denied, that plaintiffs take nothing thereby, and for such other and further relief as the Court may deem just in the premises.

DATED this 18th day of August, 1975.

Respectfully submitted,

JENNINGS, STROUSS & SALMON

By /s/ J. A. Riggins, Jr.

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[Certificate of service
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROLAND W. JAMES, et al., Plaintiffs, vs. GERMAIN H. BALL, et al., Defendants.	No. CIV 75-498 PHX WEC STIPULATED STATEMENT OF FACTS [Filed February 24, 1976]

Plaintiffs and Defendants present herewith a joint stipulated statement of facts, along with exhibits, which they agree may be considered in connection with their simultaneously-filed cross Motions for Summary Judgment. The facts stated are admitted as true by both parties only for purposes of their respective motions for summary judgment.

Both parties contributed separate facts to the statement, but for sake of continuity it was agreed to organize the statement in the form presented. Nothing should be inferred from either the order or length of particular facts stated. Further, while admitting the truth of all facts stated, each party reserves the right to contest the materiality or relevance of any fact.

DATED this 24th day of February, 1976.

Bruce Meyerson
Arizona Center for Law in the Public Interest
P. O. Box 2783
Phoenix, AZ 85002
Attorney for Plaintiffs

JENNINGS, STROUSS & SALMON

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STIPULATED STATEMENT OF FACTS

I. PARTIES

A. Nature of Action

1. This action challenges the constitutionality of the landowner and acreage voting system of the Salt River Project Agricultural Improvement and Power District ("District"), an agricultural improvement district formed under the laws of the State of Arizona, A.R.S. § 45-901, *et seq.*, which is comprised of 260,188 acres located in Maricopa County, Arizona. The District and the Salt River Valley Water Users' Association ("Association"), a corporation organized under the laws of the Territory of Arizona in 1903, operate the Salt River Project, a federal reclamation project. (The phrases "Salt River Project" and "Salt River Reclamation Project" will be used synonymously herein to refer to the federal reclamation project.)

B. Plaintiffs

2. Plaintiffs FRANK SACCO and DWIGHT M. BRAHS are citizens and registered voters of the State of Arizona who reside on District lands. These plaintiffs have no interest in any real property located within the District. Each is not eligible to participate in the District's elections because he does not own real property as required by A.R.S. § 45-909 (1975 Supp.). It is agreed that there are many others similarly situated. These two plaintiffs desire to vote in District elections on an equal basis with all persons residing within the District and otherwise qualified to vote for state officers.

3. Plaintiffs ROLAND W. JAMES, MARY FITZSIMONS, JAMES R. FITZSIMONS and JOHN H. MAFFEO are citizens and registered voters of the State of Arizona residing on District lands. Along with a substantial number of others, these plaintiffs have ownership interests in fractional acres of real property located within the District, and are entitled to cast a fractional vote in District elections.

Each of these four plaintiffs desires to exercise his or her elective franchise in District elections on an equal basis with other persons residing within the District and otherwise qualified to vote for state officers.

C. Defendants

4. Defendants GERMAIN H. BALL, ALEX M. CONOVALOFF, BILL ROUSSEAU, LEO C. SMITH, JOHN M. WILLIAMS, JR., THOMAS P. HURLEY, WILLIAM P. SCHRADER, JOHN S. HOOPES, W. LARKIN FITCH, THOMAS J. FINLEY and KARL F. ABEL are the members of the Board of Directors of the District, and its President, respectively.

II. HISTORY OF RECLAMATION IN THE SALT RIVER VALLEY

A. The Salt River Federal Reclamation Project

5. Irrigation of the Salt River Valley, within which the Association and the District boundaries lie, was begun by settlers in about 1867. The river flow was erratic, varying from a small stream to enormous floods. Shortly after settlement began, especially during years of drought, the supply of water at low river stages was inadequate for the land in cultivation. River flows in excess of immediate needs or canal capacities were lost, due to the lack of storage facilities. Maintenance of the brush and rock diversion dams also became a problem, for they were often washed out at the beginning of a flood and could not be replaced until the water was again low in the river. Years of good water supply were followed by years of drought, causing the loss of valuable vineyards, farm lands and orchards. In 1895 a few of the farmers in the Valley formed what they called the "Farmers Protective Association", the prime purpose of that Association being to secure legislation concerning water rights. Various farmers from the Salt River Valley were instrumental in lobbying the Reclamation Act of 1902 through the United States Congress for the purpose of securing comprehensive federal assistance for the systematic reclamation of lands of the Salt River Valley. The Salt

River Project was originally authorized by the Secretary of the Interior on March 14, 1903, in accordance with the Reclamation Act of 1902 (32 Stat. 33), and was the first reclamation project authorized under the Federal Reclamation Act.

6. Shortly after the authorization of the Salt River Reclamation Project, the federal government established a Board of Survey to determine what lands were capable of being benefited for agricultural purposes by the Project. In selecting those lands, the Board of Survey excluded lands actually put to urban uses (referred to as "townsite lands"). The area so designated by the Board Survey as eligible for Salt River Project water is referred to as the "Salt River Reservoir District."

7. After authorization of the Salt River Project in 1903, the Government constructed a large dam and reservoir on the Salt River known as the Theodore Roosevelt Dam. It also purchased and consolidated the various canals, ditches and other distribution facilities to form a highly developed irrigation system within the Salt River Project area.

B. Salt River Valley Water Users' Association

8. Immediately after the Salt River Project was created, the United States needed a contracting entity to assure repayment of construction costs allocated to each benefited landowner under 43 U.S.C. § 461 *et seq.* for construction of Theodore Roosevelt Dam. The Salt River Valley Water Users' Association was organized as an Arizona corporation under the laws of the Territory of Arizona in 1903 to serve as the entity with which the United States could deal as representative of the landowners for whose benefit the irrigation system was being constructed. The Articles of the Association were worked out by the joint effort of the landowners under the proposed project and the officials of the United States Reclamation Service. Shareholders of the Association are the owners of land which has been subscribed into the Association.

9. The contract between the Association and the United States providing for cooperation between the Association shareholders and the United States Government in the construction and financing of the Salt River Project was entered into on June 25, 1904, and is attached hereto as Exhibit B. In the 1904 contract the Association assumed the obligation to repay to the United States all construction charges owed to the United States by its member-shareholders for the irrigation system constructed for their benefit. The Government required membership in the Association as a condition of receipt of stored and developed water from the reclamation project. Exhibit B, Para. 2. The Secretary of the Interior reserved the right to approve or prescribe by-laws of the Association pertaining to water use and administration of the Association. Exhibit B, Para. 8.

10. The irrigation system for the lands of the Association's shareholders was operated by the United States Reclamation Service up to September 6, 1917, when the United States Government and the Association (after approval of the contract at an Association shareholders' election) entered into a further contract (attached hereto as Exhibit C) by which the operation, maintenance, and control of the Salt River Project were vested in said Association subject, however, to termination by either party in the manner therein stated, and the payment of the construction charges amounting to $10,166,021.97 due the United States.

11. Under the 1917 contract and later amendments thereto, the Association has operated and maintained, and is now operating and maintaining, the Salt River Project water delivery system and has under its Articles and By-Laws levied and collected assessments upon the lands of its shareholders to pay for operation and maintenance, for the construction charges due the United States, and for the improvements, additions and betterments of the said works made from time to time by the Association.

12. Before the management of the Salt River Project was taken over by the Association, the United States had constructed as incident thereto with government and Association funds, a hydroelectric power system, at a cost of approximately $4,500,000, to produce power to be used by the Association in support of its primary irrigation activities.

13. In order to protect its investment, and increase the revenue therefrom and the amount of water available for irrigation, the Association undertook in the 1920's and 1930's to increase the number of water storage and hydroelectric facilities. In addition to Mormon Flat Dam, constructed in 1923-25, the Association constructed Horse Mesa Dam in 1924-27 and Stewart Mountain Dam in 1928-30.

14. The Association contracted with the United States on November 6, 1935 (Exhibit F herein), later supplemented on October 14, 1936 (Exhibit G herein), for the construction of Bartlett Dam to store water on the Verde River, and for various repairs to Project works. Of the $7,500,466 cost of that project, the Association assumed the obligation to repay to the United States $6,550,361. Of the latter amount, $725,282 remains unpaid by the Association as of December 31, 1975.

15. Until 1937 the Association continued to manage, operate and maintain the Salt River Project directly. Financing for expansion of the water and power system was obtained through the sale of corporate bonds of the Association, secured by lien upon Association subscribed lands, as reflected in the list of bond issues set forth in Paragraph 50, *infra*.

16. The primary purpose for the acquisition and construction of the Salt River Project under the Federal Reclamation acts was for the development, storage and distribution of water for the irrigation of arid and semi-arid lands. The development, storage, and distribution of water to Association-subscribed lands was the primary purpose of

the Association in contracting with the United States to guarantee the repayment of construction funds and to operate the Salt River Project.

17. The development and sale of electrical power in connection with the Salt River Project by the United States and by the Association was undertaken not for the primary purpose of providing electricity to the public but to support the primary irrigation functions by supplying power for reclamation uses and by producing revenues which could be applied to increase the amount and reduce the cost of water to Association subscribed lands.

18. The Association under its current Articles of Incorporation derives its income from the following sources:

(1) Mandatory Water Assessments. (Art. XII, § 3(b)).

(2) Additional Water Delivery Charges. *Id.*

(3) Power Revenues. (Art. XII, 1, First.)

(4) Stock Assessments. (Art XII, § 1, Second, § 4.)

The Association's ultimate financing power if other revenues are insufficient is its acreage assessment power, which was last exercised in 1951. Association assessments when levied remain until paid a lien on the lands of the shareholders against which they are levied and on the stock appurtenant thereto.

The rights and obligations of membership in, and subscription to the Articles of, the Association are appurtenant to the land and run with the land.

III. THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT

A. History

19. In the mid-1930's the Association sought for a means of reducing the expenses of the operation of the Project, including interest expense. It therefore occurred to the officers of the Association that if a District could be organized under the Agricultural Improvement District Act which would issue its bonds for the purpose of providing money to take up the outstanding bonds of the Association, the bonds of the District could be placed at a much lower rate

of interest than those issued by the Association as a private corporation, and the shareholders of the Association, who, of course, would ultimately pay the District bonds, would thus be saved a very large sum of money each year. The Agricultural Improvement District Act provided for the organization of Districts which would be authorized to provide means of irrigation to the lands within such districts.

20. The Agricultural Improvement District Act, Revised Code of 1928, §3467 through 3514; 1922 Laws, Ch. 23, allowed creation of districts to be governed by three- or five-member boards. R.C. §3471. Such districts could be formed only within federal reclamation projects. R.C. §3467. All landowners were entitled to one vote each in the elections of such districts. R.C. §3473. Such districts enjoyed an *ad valorem* taxing power on real property within the District. R.C. §3498.

21. In January 1936, proceedings were initiated before the Maricopa County Board of Supervisors to create an agricultural improvement district coextensive with the boundaries of Association member land. Many shareholders of the Association objected to the formation of a district or contracting with it by the Association since voting in the district was per capita rather than by acre as in the Association. Many shareholders were also opposed to the *ad valorem* taxing power of the proposed district. The Association, therefore, determined not to proceed with final formation of a district until those and other objections could be resolved.

The Association therefore requested amendment of the Agricultural Improvement District Act to allow all landowners to vote on an acreage basis, and to establish a one-acre minimum for voting, as was the practice under Association elections. The Association also requested amendment of agricultural improvement districts' taxing power from *ad valorem* to acreage to conform such taxing power to the assessment power of the Association.

The Association also requested that the Legislature amend the Agricultural Improvement District Act by including among the purposes of such districts the reduction of the cost of irrigation, drainage and power to the owners of the land in the district by the sale of surplus water or power, the financing or refinancing as its own obligation of debt incurred or proposed to be incurred by any public or private agency in the construction, maintenance, improvement or replacement of the structures and equipment necessary or useful for the accomplishment of any of the purposes of the District. Cf. A.R.S. § 45-903 A 7 and 8.

22. The Legislature in November 1936 (Laws 1st Sp. Sess. 1936, c. 10) enacted the amendments requested by the Association.

The acreage taxing power of agricultural improvement districts (A.R.S. 45-1014) is now identical to the assessment power of the Association, in that District taxes are assessed on an acreage basis and become liens upon lands until paid (A.R.S. § 45-1015 B [1956]), and therefore have the same effect as Association assessments.

23. The officers of the Association caused a District to be organized under the Act encompassing the land which had subscribed to Association membership, provided for the issuance by the District of $13,000,000 of its bonds, and then caused a contract to be entered into between the District and the Association, the substance of which was, *inter alia*, that the District was to issue bonds and turn the proceeds over to the Association, and levy the necessary taxes to pay the bonds as they became due, while the Association was to use the proceeds of the bonds to pay off $13,000,000 of its outstanding indebtedness, and to collect from its members a sufficient amount of money to reimburse the District for the amount of taxes it was compelled to levy to meet the new bonds. The relationship between the Association and the District has often been described by the Arizona Supreme Court as one of "alter egos in substance, though not in law." The ultimate result of these transac-

tions and the District's status as a municipal corporation, with its securities exempt from taxation, has been a savings of millions of dollars to the shareholders of the Association.

24. Under the terms of the contract of March 22, 1937 between the Association and the District (Exhibit H, *infra*), the Association transferred, subject to the paramount interest of the United States, all its property to the District and agreed to continue to perform all its obligations in connection with the care, operation, and maintenance of the Salt River Project on behalf of the District. The District agreed to provide capital and operating funds to the Association to support the operation of the Project by the Association. As amended in 1944 and 1949, the contract now provides that the District itself operate the power function of the Salt River Project. The Association continues to operate the water delivery system as an agent for the District.

25. In the 1940's the Commissioner of Internal Revenue asserted deficiencies in income tax against the Association for power revenues applied to offset water costs without deduction for losses incurred in water operations. The Association set up a variety of defenses to this assessment, but in 1949 the dispute was settled by the payment of $100,000 in satisfaction of all past assessments. As a part of this settlement, the Association amended its 1937 contract with the District to have the District assume the actual operation of the power system to make clear that the revenues of the power system are exempt from federal income taxation under the then Section 116 of the Internal Revenue Code, which excludes from gross income any income derived from any public utility or the exercise of any essential governmental function and accruing to any state, or any political subdivision of a State. Subsequent to this settlement and to the 1949 amendment to the 1937 contract, power revenues continue to be applied to offset the deficits in water operation costs and are not considered by the IRS to be taxable income to the Association.

(The Commissioner of the IRS was apparently in error in refusing to allow any deduction for losses sustained in the water operations by the Association, as is now indicated by *Anaheim Union Water Co. v. Commissioner*, 321 F.2d 253 (9th Cir. 1963). The *Anaheim* case allowed non-profit water companies which furnished water and water services only to their shareholders to deduct against oil royalties, rentals and miscellaneous income the entire amount of the water costs including those in excess of charges to the shareholders for water services.)

B. Administration and Voting of the District

26. The statutes allow two forms of administration for agricultural improvement districts. Under the first, A.R.S. § 45-931 through § 45-942, a district is governed by a Board of Directors of between three and nine members. A.R.S. § 45-981 B. The District is governed under the alternate form, A.R.S. § 45-961 through 45-968, which allows for governance by a ten-member Board of Directors (the President is also an ex officio member) and a thirty-member Council. The District is divided into ten division, each of which elects one Director and three Council members. A President and Vice-President are elected at large. The boundaries of the electoral divisions of the Association and the District are virtually identical. The alternative form of administration is virtually identical to the governmental structure of the Association.

27. The statute allows for equal voting among qualifying landowners, or for acreage voting if so requested in the organization petition. The petition for organization of the Salt River Project Agricultural Improvement and Power District provided for elections on an acreage basis after the initial organization election. A.R.S. § 45-983. The election for formation of the District, however, was conducted on a one man, one vote basis among qualifying landowners. After the formation of the District, its elections have been conducted on an acreage basis.

28. To qualify to vote in District elections, electors must own taxable property within the District and possess the qualifications required of electors for state officers. Otherwise qualified electors of the District need not reside within the District to be entitled to vote their land in District elections. A.R.S. § 45-909.

29. In 1969 the Legislature amended the District's voting system to allow owners of fractional acreage to vote fractionally. A.R.S. § 45-983 (1975 Supp.). In the same year the Association amended its Articles of Incorporation to allow identical voting of fractional shares. Previously, a one-acre minimum landholding was required to vote in District and Association elections. Association Articles, Art. VII, §2. The effect of these changes was to give individual landowners a vote in Association and District elections in proportion to the lien on their land. As land use changes from agricultural to urban uses, therefore, the degree of urban participation allowed in District elections proportionately increases.

30. General elections of the Association and of the District are conducted simultaneously at the same locations by the same election officers on the first Tuesday of April of each even numbered calendar year. The Association elections are conducted pursuant to Article VII of its Articles, the District elections are conducted pursuant to A.R.S. § 45-981 through 45-992 (1956 and 1975 Supp.).

C. District-Association Relationship

31. To the extent that the Association and the District have identical boundaries, identical constituencies, and identical purposes, there has been since 1937 a close cooperation and consistent agreement over policy between the two in the management of the Salt River Project. The management staffs of the District and of the Association have been the same since shortly after the District took over operation of the entire Project in 1949.

32. The District was formed by the Officers of the Association, with the cooperation of the Legislature, for the immediate purpose of refinancing as its own obligations outstanding debts and of refinancing future debt in connection with the Salt River Project, all at the more advantageous interest rates available to municipal corporations. The mechanism for achieving this purpose was to form the District, assign to it the Association property rights and duties, and authorize it to perform contract obligations, which would serve the same purpose and ends which the Association has served and pursued.

33. The Association and its member landowners would not have transferred title to its property and control of the Salt River Project, including the power system, to a public body governed under a voting system without acreage voting and open to all qualified state electors solely on the basis of residence on District land.

34. The District was organized for the purpose of continuing the operations of the Association, the principal objective of which was to provide water for use within the geographic boundaries of the Association and District. Landowners were the intended beneficiaries *inter alia* because electric revenues were to be used to reduce the cost of development, storage and distribution of water to District lands. Subsequent to its formation in 1937, the District has continued to use electric revenues to defray the expense of providing water to District lands. The primary legislative purpose of the District is to provide water to District lands.

D. District Voting Information and Statistics

35. As of August 1975, 141,474.61 acres within the District were eligible to be voted in District elections. This is approximately 60% of the total number of acres within the District, excluding streets, alleys, canal rights-of-way, and

the Salt River riverbed. (Property held by corporations, municipalities, or other governmental bodies may not be voted, but property held by municipalities or other governmental bodies is not subject to the District's taxing power.)

36. The following table shows the number of people voting in District elections since 1970 and the total number of acres voted:

Election Year	Number of Voters	Number of Acres Voted
April 7, 1970	621	19,074.24
April 4, 1972	984	43,068.98
April 2, 1974	561	15,219.73

37. Between 1937 and 1974 the relative land uses in the District changed from 5.6% urban and 94.4% agricultural to 47% urban and 53% agricultural. (For the purposes of these statistics it is arbitrarily assumed that land parcels of one acre or less are urban and larger parcels are agricultural.) In 1974, 22.4% of all water delivered by the District and Association was delivered to municipalities; 15.% was put to other nonagricultural uses, and the balance was used in agriculture. Portions of eight Arizona municipalities are located within the geographic boundaries of the District — Phoenix, Mesa, Tempe, Scottsdale, Glendale, Chandler, Peoria, Tolleson and Gilbert. Substantial numbers of persons in the Phoenix metropolitan area reside on District lands.

E. Criteria for Inclusion of Lands Within District Boundaries

38. All lands included within the boundaries of the District were lands susceptible of irrigation by the same general system of irrigation works. Lands otherwise within the exterior boundaries of the District but excluded from the boundaries of the District were lands which would not be benefited generally or especially by the irrigation works of the District. The total acres as established by order of the Board of Supervisors on January 25, 1937 is 260,188 acres. At present, the total number of acres in the District, excepting canal rights-of-way, streets, alleys, and the Salt

River riverbed, is 236,482.66 acres. The total area excluded from the District but lying within the exterior boundaries of the District is 84,131 acres. Those areas excluded because they are not susceptible to irrigation by reason of high ground amount to a total of 39,494 acres. Approximately 35,021 acres are excluded from District boundaries because owners of the lands had not subscribed them into the Association, including 1,245 acres in the North Tempe area, 20,636 acres in the Salt River Indian Reservation, 7,720 acres in the South Chandler Water Conservation District, and 5,420 acres in the Peninsula-Horowitz and Maricopa Garden Farms area. Approximately 9,136 acres of land otherwise within the exterior boundaries of the District were excluded because they were townsite lands not eligible for reclamation project stored and developed water. (In addition to this, there are 480 acres in the City of Tempe entitled only to normal flow water, which are treated the same as townsite lands.)

F. Water Functions of the District

39. A comprehensive adjudication of water rights within the reservoir district was handed down by the District Court for the Third Judicial District of the Territory of Arizona on March 1, 1910, in the case of *Hurley v. Abbott* (the Kent Decree). Under that Decree, the normal flow of the river was found to have been appropriated to approximately 151,000 acres of land, and those vested water rights were confirmed. Rights to share in the additional water stored and developed by the reclamation project are shared equally among all land subscribed to Association membership. Lands not subscribed to Association membership have no right to share in reclamation water, and are limited to receipt of the normal flow water appropriated before the Kent Decree. The Kent Decree remains the governing determination of surface water rights in the Salt River reclamation reservoir district.

40. All surface water rights in the Salt River Project are appurtenant to the land under Arizona water law or proportionate to the land under federal reclamation statutes and the Articles of the Association. Rights to stored and developed water above the normal flow of the river are divided equally among all acres of Association (and District) land.

41. The water which the Association, as agent for the District, delivers to municipalities is, first the vested water rights of the municipality itself and of land owned by the municipality, and, second, the appropriated and stored and developed water appurtenant to or allocated to District or townsite lands within the corporate limits of the municipality and which the owners have not sought to have delivered directly by the Association. By contract the municipalities receive appropriated and stored and developed water which is appurtenant to or allocated to city land as agent for the owners of the land to which said waters are appurtenant or allocated; the city then pays on behalf of the landowners the assessments and water charges chargeable to the owners of the land. The cities then assume the responsibility to deliver the water to the lands entitled to receive it. Landowners may still receive from the Association (at the high point of the quarter section in which the land is located) any and all waters to which their land is entitled, although some landowners find it more convenient to accept delivery of their water through the cities. Since the municipalities take water from the Association either as appropriators or as agents for the landowners and in proportion to the water rights of the landowners, the assessments and charges made to municipalities for water delivered to them are the same as the assessments and charges made to other landowners for the delivery of their water. (Water trades are sometimes made for the convenience of the parties in which District water is used outside the District in exchange for which an equal amount of non-District water is brought into the District.)

Water is fungible. If the cities receive water from sources other than the District and mix it with District water, the water actually delivered by the cities to the landowners may not be able to be distinguished as to the sources from which it came.

42. The District provides water to eight cities in Maricopa County for municipal use. During 1974 the District provided water as follows:

City	Acre-feet from SRP	Percent from SRP
Chandler	707	14%
Gilbert	304	35%
Glendale	9,995	68%
Mesa	3,313	15%
Peoria	764	81%
Phoenix	122,974	61%
Scottsdale	2,471	40%
Tempe	19,814	92%
	160,342	59%

In 1975 these eight cities and towns paid a total of $620,699.85 to the Association in water assessments and delivery charges.

43. The landowning and acreage voting requirements of the Association and the District are intended to allocate to land and water interests the control of the affairs of the Association and the District, in proportion to the varying amounts of water rights and financial burdens borne by the various voters, because of the following considerations: (1) The acreage lien for general obligation bonding, A.R.S. §45-1047, (2) The acreage taxing power under A.R.S. §45-1011, *et seq.* (which has thus far not had to be used), (3) The Associations's acreage assessments for water, and, (4) The land proportionate basis of stored and developed water rights under federal reclamation law and the Articles of Incorporation of the Association and the somewhat land proportionate basis of appropriated water usage.

44. The District and the Association now service the water rights of 238,269.90 assessed acres of land. Normal flow water rights of some non-member lands, as established in the Kent Decree, are also served. The reclamation system has a 2,072,050 acre feet storage capacity in six reservoirs, and an 812,506 acre-feet groundwater pumping capacity. The water is distributed by 131 miles of major canals, 875 miles of laterals and 263 miles of drainage or waste ditches. The Association and the District administer the water rights established in the Kent Decree.

45. During the last ten years about 83% of the water system costs have been financed with power revenues. In 1974, revenues from water and irrigation activities were $2,613,184. The expenses, including depreciation, for irrigation and water operations exceeded revenues by about $14,000,000, and that deficit was met from power revenues. Water support has averaged approximately $10,000,000 annually since 1965. These amounts do not include expenditures for additions and improvements to the irrigation plant for repayment of long-term debt, which must also be met from power revenues. Any decrease in support from power revenues would have to be met from increased water delivery charges.

G. Power Function of the District

46. The District serves approximately 240,000 electric customers, of which approximately ninety percent (90%) are residential customers. Approximately 85% of the District's electric customers reside within the geographic boundaries of the District. A detailed summary of the District's electric operations is contained in Exhibit K which is a copy of the Official Statement for 1976 Series A Revenue Bonds. During 1974 revenues from the sale of electricity were $168,057,000 or ninety-eight percent (98%) of total revenues.

The District provides a reliable supply of essential electric energy and water in substantial portions of the Salt River Valley; thus, the District operation is important to the development of the Salt River Valley.

47. The District does not, and is not required to, serve electricity to all member lands; and it serves large areas outside of its boundaries. In 1955 the Arizona Corporation Commission and the Secretary of Interior approved an agreement between Arizona Public Service Company and the District establishing the service territories of each. Generally speaking, Arizona Public Service Company serves electricity to approximately 15% of the District area. The agreement resulted in (i) continuance of service by District to rural areas then served by it, even though such areas were later annexed by the cities in which APS was serving, (ii) the District withdrawing from retail service in certain areas and the assumption of service by APS, and (iii) APS agreeing to purchase from District at wholesale, the power requirements necessary to supply the retail sales in the areas where the District discontinued service.

48. By its Articles of Incorporation, the Association is obligated to compensate shareholders who pay substantially more for electricity used on Association land and purchased from public service corporations for domestic and ordinary farm purposes than shareholders who purchase electricity directly from the Association. By its contract of 1937, as amended, the District has assumed this contractual obligation of the Association to resident landowners. The District has on one occasion in the past discharged this contractual obligation of itself and of the Association to compensate District landowners for the difference in electricity costs between what they have paid public service corporations and what they would have paid the District for equivalent kinds of electric service.

H. Financing of the Salt River Project by the District and the Association

49. The District's long-term debt consists of General Obligation Bonds and Electric System Revenue Bonds. General Obligation Bonds outstanding are portions of eleven different issues sold between 1950 and 1972. All General Obligation Bonds were and are guaranteed by the Association.

Original amounts of outstanding issues	$358,970,000
Amounts paid at maturity	52,510,000
Bonds reacquired and cancelled	1,830,000
Bonds refunded	13,470,000
Total Outstanding	$290,980,000

These bonds are secured by a lien on all taxable real property within the District's boundary. The outstanding principal represents a potential tax totaling $1,221.25 per acre, not including the interest requirements. Outstanding General Obligation Bonds are not scheduled to be retired until 2003. Revenue Bonds outstanding totaling $600,000,000 were sold between 1973 and 1976. The first principal maturities come due in 1976. These bonds are secured by a pledge of revenues. Their lien on revenues is junior to the lien of the General Obligation Bonds.

50. Before the District began financing the Association, bonds were issued in six issues totaling $12,683,000. These bonds were sold at various dates between February 1, 1923 and November 1, 1938. The final maturity of Association bonds was in 1958. All these bonds were either paid at maturity out of Association revenues or refunded by District bonds. In addition, there were three issues of Agricultural Improvement bonds totaling $2,343,000. These were sold between May 1924 and February 1925. The Association guaranteed payment and in two cases pledged specific electric revenues to guarantee payment. Drainage District bonds totaling $125,000 were assumed as a general obligation of the Association on October 24, 1924.

51. In addition to the District bond issues summarized in paragraph 48, between 1938 and 1948 the District borrowed $24,371,000 in five bond issues which have been entirely repaid or refunded. Of that amount, $10,905,000 was borrowed to refund past indebtedness. All these debts were guaranteed by the Association. The last of these bonds were retired by July 1, 1975.

52. In addition to the original interest-free construction and acquisition funds which were repaid by 1955, since 1950 the United States has advanced to the Association $21,950,470 in interest-free loans for rehabilitation and betterment of project facilities, of which $10,881,063 has not yet been repaid to the government. Rehabilitation and betterment of the project works is being accomplished under the authority of the Act of October 7, 1949 (63 Stat. 724) as amended.

53. The current financial condition of the District as of December 31, 1974 is as reflected in the attached 1974 annual report (Exhibit L), pages 11 through 19. The current operations and activities of the District are as reflected in the attached 1975 annual statement, pages 20 and 21.

54. In summary, the plant investment per assessed acre of the District as of the end of 1974 was approximately $3,500.

55. Because of the past and continuing substantial investment for the development, storage and distribution of water to the Association and Distric lands, said lands have been assured of a reliable supply of water at a reasonable cost for the indefinite future. Because of the assurance of this indefinite supply of water, the assessed valuation of agricultural lands within the District and the Association is generally twice the assessed valuation of comparable agricultural lands outside the boundaries of the District and the Association.

56. Viewed as a percentage of gross power revenues, the amount of District power revenues utilized to meet water costs is approximately equivalent to the dividends paid to common stockholders in comparable electric utility companies.

I. District Tax Payments

57. Since 1963 the District has been authorized to make voluntary contributions in lieu of property taxes by A.R.S. § 45-2201 *et seq.* (1975 Supp.). These contributions are based on the value of property used by the District for the generation, transmission and distribution of electrical energy and upon the same assessment percentage applicable to utilities. In substance, the electrical facilities of the District are taxed the same as privately owned electric utility property.

58. Tax payments by the District in the last ten years include the following:

	Voluntary Payments in Lieu of Property Taxes	Ad Valorem Property (N.M., Nev. & Colo. Taxes)	Sales	Payroll	Total
1966	1,903,255		1,166,673	558,288	3,628,216
1967	2,675,989		1,246,953	624,552	4,547,494
1968	1,542,336	5,724	1,876,763	731,251	4,156,074
1969	4,506,785	76,068	2,442,366	849,600	7,874,819
1970	4,175,409	228,718	2,772,673	936,233	8,113,033
1971	5,490,727	371,813	3,175,105	1,075,409	10,113,054
1972	6,253,502	430,766	3,860,503	1,210,581	11,775,352
1973	6,644,077	411,427	2,703,628	1,753,523	13,512,655
1974	12,149,751	516,588	6,382,393	2,220,780	21,269,512
1975	16,621,310	(	—Not Available—		)
Total	61,963,141				

IV. MISCELLANEOUS

59. The secretary of the interior has comprehensive power under Federal reclamation statutes and the contracts between the United States and the Association and the District to supervise the District and the Association's

management of the Salt River Project, including the power operations. 43 U.S.C. § 498, 499, 500. The Secretary has never revised rates set by the District.

60. Although the District has an obligation to continue to use electric revenues to reduce the cost of water delivery, the precise amount of the subsidy is not fixed. District electric customers (particularly those who are not water users) might want to reduce the amount of the subsidy, whereas farmers, ranchers and others who economically benefit from less expensive water would undoubtedly oppose any substantial reduction in the subsidy level. Therefore, should the voting constituency of the District be changed as requested by plaintiffs, conflicts in the joint conduct and management of the water and electric operations would probably result between the District and Association which could interfere with the present harmony of operation. This would make it more difficult to borrow funds and would increase interest rates. An initial change in composition of the District Board of Directors would, because of concern in the financial community about instability of management, result in greater difficulty and higher cost of borrowing capital funds. It would be difficult to predict the long-range effects of such change.

61. The District has operated and continues to operate an "area development function" which responds to inquiries from firms considering locating offices in Phoenix. District area development people have worked with the following firms which have located in the Valley: Sperry Information Display Systems, Greyhound Corp., Capitol Foundry, Applied Materials, Digital Equipment, G. D. Searle, Co., Data Packaging, Motorola, Revlon, Marathon Steel, Honeywell, Rogers Corp., Talley Industries, Western Electric, Siemens, and General Instruments.

62. There are approximately 326 miles of transmission lines, 2,570 miles of overhead distribution lines and 1,124 miles of underground distribution lines located within the District's geographical boundaries. The District has 4 gen-

erating stations, 9 bulk power receiving stations, 64 residential distribution stations and 15 industrial distribution stations located within the District.

63. There have been occasional protests concerning the presence and location of power lines and towers.

64. The Salt River, which runs through the District's geographical area, is normally dry, but occasionally flows as a result of heavy runoffs from storms over which the District has no control. The occasional major quantities of water which have flowed in the Salt River in the last decade have been the result of sheet runoff into the river below Granite Reef Dam and releases from reservoirs operated by the District. The District has control of the reservoir outlets, but no control over the amount of water which flows from the Salt and Verde Rivers and Tonto Creek and various washes and creeks into the reservoirs or inflows into the canal system and Salt River below Granite Reef Dam. During the months of December 1965, and January, February and March of 1966, 551,504 acre-feet of water were released into the Salt River below Granite Reef. The water in the Salt River in 1965 destroyed or damaged all principal SRP transmission lines crossing the river, and it was reported that over 2,000 people temporarily left their homes. Service outages affected no more than 20% of the SRP service area, although approximately 30-40% of the then current electric load was involved to some degree. The remainder of the SRP electric service area was not affected in any significant way by the water.

During 1973, the District released 1,239,506 acre-feet of water from its reservoirs to accommodate heavy runoffs from watersheds. The releases of water in 1973 and 1965-66 were necessary because the reservoirs had reached a point beyond which they could not safely be filled further. The Bureau of Reclamation was kept informed of and concurred in the decisions to release water on both occasions.

On September 4, 1970 a rainfall of 100 year return frequency occurred in the watershed which is contributory to the Arizona Canal and Pima Road intersection in Scottsdale, Arizona. The Arizona Canal overflowed at that location, carrying sheet runoff, contributing to the flooding of homes located in subdivisions south of the canal, and it was reported that flood damage affected 1,000 homes. Owners of 220 flood-damaged homes brought suit against the Association and the District; total damages from the flood were agreed to be $720,345.45, although the Association and the District contest any liability on their part, and the District was dismissed from the suit by directed verdict.

The Arizona Canal and all other Project canals and ditches are intended and designed for irrigation; they are not flood control devices and were never intended as such. *Ramada Inns, Inc. v. Salt River Valley Water Users' Association,* 111 Ariz. 85, 88, 523 P.2d 496 (1974). Irrigation canals are designed and built entirely differently from flood control canals. Arizona statutes do not allow the District to engage in flood control functions. *Cf.* A.R.S. § 45-903 (1956). Federal Reclamation statutes do not allow the District to alter irrigation distribution facilities so as to accommodate natural runoff. 43 U.S.C.A. § 421 A (1975 Supp.) Nor may the District make major changes in Project facilities without the consent of the Bureau of Reclamation.

Any flood control benefits of the District's activities are only those naturally incident to the impoundment of water from natural water courses and the carrying capacity of the canals at any given time. The District may not under State or federal laws sacrifice its irrigation purposes to achieve flood control ends.

The Maricopa County Flood Control District and the Army Corps of Engineers are the state and federal agencies charged with flood control in the Salt River Valley.

65. The following documents and contracts attached hereto and designated Exhibits A through J, submitted by defendants, are true, accurate, authentic and complete copies of the documents which they purport to be; all facts recited in any such documents are true as of the dates of the documents in which they are recited; it is further stipulated that all legal rights, duties, liabilities, and relationships which the following documents purport to create or establish are true, valid, and binding according to the terms of said documents.

Exhibit A. Articles of Incorporation of the Salt River Valley Water Users' Association, as amended through April 4, 1972.

Exhibit B. Contract of June 25, 1904 between the Association and the United States.

Exhibit C. Contract of September 6, 1917 — Agreement providing for transfer of care, operation and maintenance of the Salt River Project to the Association.

Exhibit D. Contract of July 26, 1922 between the Association and the United States — Supplemental Agreement to 1904 and 1917 Agreements.

Exhibit E. Contract of April 25, 1928 between the Association and the United States — Amended and Supplemental to July 26, 1922 Agreement.

Exhibit F. Contract of November 26, 1935 between the Association and the United States — contract providing for construction of Bartlett Dam and repairs to project works.

Exhibit G. Contract of October 14, 1936 between the Association and the United States — supplemental to November 26, 1935 contract.

Exhibit H. Contract of March 22, 1937 as amended on February 28, 1944 and September 12, 1949 between the Association and the District approved by the United States transferring property of the Association to the District and delegating from the Association to the Dis-

trict the operation of the Salt River Project, with the Association retaining the irrigation functions of the project.

Exhibit I. Contract of June 30, 1950 between the Association and the United States amending the contract of September 6, 1917.

Exhibit J. Resolution of Maricopa County Board of Supervisors establishing Salt River Project Agricultural Improvement and Power District dated January 25, 1937.

66. The factual and statistical date contained in the following documents submitted by defendants are true as of the date of each document.

Exhibit K. Official statement for 1976 Series A Revenue Bonds, dated January 22, 1976.

Exhibit L. Salt River Project Annual Report 1974.

Exhibit M. Salt River Project Annual Report 1973.

Exhibit N. Salt River Project Annual Report 1972.

Exhibit O. Salt River Project Annual Report 1971.

Exhibit P. Salt River Project Annual Report 1970.

67. The following document, offered by plaintiffs, attached hereto and designated Exhibit Q, is a true, accurate, and complete copy of the document which it purports to be:

Exhibit Q. March 18, 1969 resolution of the Board of Directors of the District endorsing a change in District elections which would allow voting on a fractional acreage basis.

68. The factual and statistical data contained in the following documents, offered by plaintiffs, attached hereto and designated Exhibits R, through W, are true:

Exhibit R. Breakdown of voting in District elections for the officers of director, president and vice president for 1970, 1972 and 1974.

Exhibit S. Summary of water usage and water charges for the directors of the District during 1974.

Exhibit T. Biographical data of the District directors.

Exhibit U. Acreage and eligible votes in each of the ten (10) divisions of the District.

Exhibit V. Management's recommendation: Proposed Rate Increase, dated June 2, 1975.

Exhibit W. Formal presentations made at special Board meeting of the District, dated July 30, 1975.

69. Defendants offer the following maps, designated Exhibits X, Y and Z attached hereto, which are true and accurate representations of the areas they purport to represent:

Exhibit X. Salt River Project Agricultural Improvement and Power District, Eligible Voting Lands (1974).

Exhibit Y. Salt River Valley Water Users' Association, Eligible Voting Member Lands (1974).

Exhibit Z. Salt River Project Service Area (electricity) (1976).

FIRST SUPPLEMENT TO STIPULATED STATEMENT OF FACTS

70. Subject to the qualifications explained in this paragraph, the relative urban and agricultural land uses in the District in selected years were as follows:

Year	Agricultural	Urban
1937	229,460	13,500
1947	228,475	14,650
1957	199,960	39,441
1970	151,946	86,318
1971	146,005	92,259
1972	138,724	99,540
1973	132,774	105,490
1974	125,741	112,523
1975	124,452	113,812

These data were generated under a system devised by the District. The land use change has averaged 1% per year since 1937, although in the early 1970's the rate of change was higher due to circumstances of unusual economic growth. The rate of change in 1975 was 0.5%. The figures given do not purport to reflect actual land use. The figure for urban use include land actually put to urban use, land put to non-commercial agricultural use (crops or livestock used by owner rather than marketed), and vacant land held for speculation. Vacant land is classed according to the predominant surrounding use, except that it is sometimes assumed that vacant land in rural areas but in the urban growth pattern is held for speculation if owned by corporations, so such land is sometimes classed as urban.

71. Water assessments and delivery charges were recently increased to produce an additional $1,055,000 in water revenues. Mandatory acreage water assessments were increased 30%; delivery charges for additional normal flow and stored and developed water were increased 88%.

72. Plaintiff DWIGHT BRAHS purchases electricity from the District. Between March 1975 and February 1976, his average monthly bill was $27.20; his lowest bill was $18.39, and his highest bill was $34.83. Plaintiff ROLAND JAMES owns and operates a 16-unit apartment building; he purchases electricity from the District for each of the apartment units. Between March 1975 and February 1976, the average monthly bill for these 16 units was $292.29, the lowest bill was $205.91, and the highest bill was $410.95.

73. In April 1974, approximately 359,601 persons owned parcels of land within the District eligible to be voted if those persons were otherwise qualified electors of the State of Arizona. It cannot be determined how many of those 359,601 persons were qualified electors of the State of Arizona and therefore were eligible to vote their land in the District election.

74. During 1976, it is estimated that 25% of all water deliveries by the Association will be to cities. These deliveries are of water either owned by the cities or which landowners in the cities have allowed the cities to accept from the District on behalf of the landowners. Another 15% of water delivered by the Association will be used by its owners (the landowners) in non-agricultural but predominantly irrigation uses, including parks, playgrounds, schools and subdivision irrigation. The balance of the water delivered by the District will be used by its owners in agriculture.

75. As is indicated in paragraph 41 of the Stipulated Statement of Facts, eight Valley cities, pursuant to contract with the Association, accept delivery from the Association of some water which is appurtenant to or allocated to land within the cities. Those cities take delivery of the landowners' water as agents for the landowners. The cities accept delivery only of water which the individual landowners designate to be delivered to the cities as their agents. The cities then act as agents of the Association for the collection of taxes, assessments, and other charges on all Salt River Project lands within the cities, and they guarantee the payment of such charges to the Association. Although the practice may vary from city to city, presently the City of Phoenix pays the assessments and charges on behalf of the landowners from city water revenues, and the landowners then allow the city to use their water without receiving further compensation from the city for their water. The exact number of acres for which the landowners have designated each city to accept delivery of water is variable since such a designation, once made, may be changed. As of December 31, 1975, landowners were allowing the cities to accept delivery of water belonging to the following numbers of acres of District land:

Phoenix	45,751.95
Tempe	10,107.75
Peoria	513.85
Glendale	5,393.35
Gilbert	804.55

Scottsdale	1,657.10
Mesa	1,513.25
Chandler	785.25

76. Arizona Public Service Company and Tucson Gas & Electric Company are the first and third largest electric utilities in the State of Arizona. They are both investor-owned private corporations. Of the eight cities in the District, only Mesa serves electrical energy to its citizens.

77. Mr. and Mrs. WILLIAM P. SCHRADER currently own 0.22 acres of land in the District.

78. The cost to the District of holding an Association election alone is not significantly less than the cost of holding an Association election and a District election together.

79. Attached hereto and designated Exhibit AA is a true, accurate, authentic and complete copy of the contract under which the City of Phoenix delivers some water to the City as agent for some landowners. It is agreed that the contracts under which the Association delivers some water to Scottsdale, Tempe, Mesa, Peoria, Glendale, Gilbert and Chandler do not vary materially from the terms of Exhibit AA.

80. The share of agricultural water subsidy of the average residential power customer of the District in 1975 was approximately $9.47, and the residential water subsidy was approximately $4.81. Using figures most recently available (1974), the average subsidy per acre-foot of water was $14.03. The average cost for 5 acre-feet of water in 1974 was $22.50. The full cost of the same amount of water without any assistance would be $101.15.

81. Attached hereto and designated Exhibit BB is a map which depicts the land uses within the District and surrounding areas as of 1970. (This map was prepared by the Maricopa Association of Governments.)

SECOND SUPPLEMENT TO STIPULATED STATEMENT OF FACTS

82. Presently all eight cities which accept delivery of water on behalf of landowners pay the assessments and charges on behalf of the landowners from city water revenues.

83. The average subsidy per acre-foot of water for the following years was as follows:

1974	$14.03
1973	8.02
1972	15.32
1971	13.60
1970	12.65

84. The share of agricultural water subsidy and residential water subsidy of the average residential power customer, assuming those subsidies are met from no other power revenues, of the District in the following years was as follows:

Year	Agri. Assist.	Res. Assist.
1975	$ 8.89	$5.22
1974	12.06	7.39
1973	11.35	4.41
1972	17.31	8.92
1971	17.03	7.65
1970	19.12	7.81

In fact, the share of subsidy borne by residential power users is less because all power customers share some portion of the support.

85. On the average, about 5.3% of the agricultural land in the District lies fallow or idle. Various crops consume differing amounts of water per acre. For example, alfalfa hay consumes a seasonal use of 74.3 inches of water per acre; cotton consumes 41.2 inches; cereals generally consume less than 25.5 inches and lettuce 8.5 inches of water per acre. These crops, among others, are grown on District lands.

In The
Supreme Court of the United States

October Term, 1979

No. 79-1740

GERMAIN H. BALL, et al.,
Appellants,

vs.

ROLAND W. JAMES, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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MOTION TO AFFIRM

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In The

Supreme Court of the United States

October Term, 1979

No. 79-1740

GERMAIN H. BALL, et al.,
Appellants,
vs.
ROLAND W. JAMES, et al.,
Appellees.

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees respectfully request that the final judgment and decree of the Court of Appeals be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

QUESTION PRESENTED

Whether a multi-purpose political subdivision which provides electric service to one-quarter million customers and 60% of the municipal water supply for approximately 1.5 million people may condition voting on property ownership.

STATEMENT OF THE CASE

The Salt River Project Agricultural Improvement and Power District (Salt River District or District) is only one of the many thousands of units of local government in the United States. But to the residents of the Phoenix metropolitan area its pervasive electric and water activities make it the paramount governmental body in central Arizona. The Salt River District is most certainly unique among the many political subdivisions in this country. Wearing one hat, it operates the Salt River Reclamation Project, the first

reclamation project authorized under the Federal Reclamation Act. Facts ¶¶ 1, 5.[1] Wearing another hat, it administers a water delivery system, through its agent, the Salt River Valley Water Users' Association, which supplies 60% of the water used for municipal purposes in metropolitan Phoenix. Facts ¶ 42. And finally, wearing its electric power hat, the District operates the second largest electric utility in Arizona, and the seventh largest publicly-owned electric utility in the United States. AMERICAN PUBLIC POWER ASSOCIATION, THE PEOPLE'S RIGHT TO CHOOSE 15 (1978).

Not only does the Salt River District play a pivotal role in the delivery of energy and water services in Arizona, but it is key in the development of energy and water policy formulation in the rapidly growing Phoenix area. Because of its varied functions it is heavily involved in such diverse activities as development of alternative energy sources, groundwater reform, participation in nuclear power generation, flood control, participation in the Central Arizona Project and home energy audits to encourage conservation.

In addition to affecting the lifestyle of all residents in its geographic area, the District's activities are financed almost entirely by its electric customers. Ninety-eight percent of District revenues are from sales of electricity. Facts ¶ 46. Additionally, 83% of water system costs are also financed by power revenues. Facts ¶ 45. Twenty-five percent of District water is delivered to municipalities, Facts ¶ 74, and paid for from city water revenues. Facts ¶ 82.

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[1] "Facts" refers to the Stipulated Statement of Facts set forth in Appendix C to the Jurisdictional Statement.

Appellants misstate the relationship of the District's water activities to its power functions.[2] Appellants imply that the District's power activities are entirely subordinate to its water activities. But under Arizona law, the District has express authority to supply power to its residents without regard to its reclamation purposes. A.R.S. § 45-903(A) (6) (1956).

Regardless of how appellants choose to characterize the District, it is, first and foremost, a "political subdivision of the state ... entitled to all the immunities and benefits granted to municipalities ...." *City of Mesa v. Salt River Project Agricultural Improvement and Power District*, 92 Ariz. 91, 97, 373 P.2d 722 (1962). The District's enabling act and the Arizona Constitution place it on par with municipalities. Ariz. Const., Art. 13, § 7; A.R.S. § 45-902 (1956). The Directors of the District, the appellants herein, have plenary and complete power to direct District operations and affairs, including the authority to set rates for water and electric service. A.R.S. §§ 45-934-937 (1956) (1979 Supp.).[3]

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[2] For example, at page nine of the Jurisdictional Statement, referring to the Stipulated Statement of Facts, appellants state that the "development and sale of electrical power ... was not undertaken for the primary purpose of providing electricity to the public but to support the primary irrigation functions .... Facts ¶ 17." But paragraph 17 refers to the "Salt River Project" which describes the reclamation project, Facts ¶ 1, not the District. The activities of the federal reclamation project are distinct and separate from the District's responsibilities under Arizona Law.

[3] In 1955 the Arizona Corporation Commission approved an agreement between Arizona Public Service Co. and the District which allocated service territory for each utility. Facts ¶ 47. The District provides electricity to about 75% of the combined areas of Phoenix, Scottsdale, Tempe, Mesa, Glendale, Chandler, Peoria, Tolleson and Gilbert. Facts ¶ 37; Exh. K., p. 8.

The dispute in this case centers on whether the District's one acre, one vote system is subject to traditional equal protection analysis or whether it is the type of limited-purpose unit of government discussed in *Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE HOLDING IN *SALYER LAND CO. v. TULARE LAKE BASIN WATER STORAGE DISTRICT.*

A. Salyer is a narrow exception to the one person, one vote requirement.

The Court has reiterated many times that the right to vote is considered one of the most sacred and important rights in our society. *Reynolds v. Sims,* 377 U.S. 533 (1964); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Thus, limitations on the one person, one vote principle have been struck down in a variety of circumstances, even though the governmental unit was not a so-called "general purpose" political subdivision. *Police Jury of Parish of Vermilion v. Hebert,* 404 U.S. 807 (1971) (road district); *Hadley v. Junior College District of Metropolitan Kansas City,* 397 U.S. 50 (1970) (junior college district); *Kramer v. Union Free School Dist. No. 15,* 395 U.S. 621 (1969) (school district).

In *Salyer,* the Court established a narrow exception to the traditional one person, one vote standard. Because the Tulare Water Storage District had a "special limited purpose," with relatively "limited authority," 410 U.S. at 728, and because its activities disproportionately affected landowners, *id.* at 729, land-based voting was reviewed under the test of reasonableness rather than a stricter standard of review. In short, the Court found the election process to be

of "special interest" to a discrete group primarily affected by the water district's activities. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 69 (1978); *Hill v. Stone*, 421 U.S. 289, 295 n.5 (1975).

In *Salyer* the Court was confronted with a district engaged in water storage and delivery operations for a remote agricultural area in which only 77 people resided. *All* costs of the water delivery operations were charged against landowners in proportion to services rendered. Over three-fourths of the land was owned by four corporations.[4] The Court concluded that because of its special, limited purpose, and because its activities disproportionately affected landowners, land-based voting would be measured against the reasonableness test.

B. *The holding of the Court of Appeals is entirely consistent with Salyer.*

Although appellants characterize the opinion of the Court of Appeals as undercutting the logic and rationale of the Court's holding in *Salyer*, an objective review of the opinion reveals that the contrary is true. The Court of Appeals carefully reviewed the functions and effects of the Salt River District in light of the standard established in *Salyer*. Size,[5] per se, was not used to distinguish the Salt River District from the water district in *Salyer*.

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[4] This is to be contrasted with the Salt River District where there are over 359,000 property owners. Facts ¶ 73.

[5] Although not "wholly determinative," differences in the "size of the population served" should not "be ignored in assessing the effects of *Salyer*." *Choudry v. Free*, 131 Cal. Rptr. 654, 552 P.2d 438, 443 (1976). In *Choudry* the California Supreme Court considered the acreage voting restrictions of the Imperial Irrigation District, remarkably similar to the Salt River District. Finding, *inter alia*, that the directors of the Imperial District, "decide such issues as rate increases for water and power, the distribution of water between agricultural and nonagricultural uses, and other matters which could vitally affect the economic welfare of the residents," the court held that it was unconstitutional to condition voting upon land ownership. 552 P.2d at 441.

The Court's opinion in *Salyer* identified two criteria which must be met if the election process of a local governmental unit would not be subject to the careful scrutiny of preceding cases. Such a governmental body must have (1) a special limited purpose, and (2) a disproportionate effect of its activities on landowners as a group. 410 U.S. at 728. The Court of Appeals' opinion is clearly predicated upon this standard.

The Court of Appeals concluded:

> [T]oday the size and *nature* of the projects of the District and the *effect* of its operation on all of the residents of Arizona are far more *extensive* than those of the district in *Salyer*.
>
> * * *
>
> In view of the *broad scope* and *impact* of its activities, the Salt River District cannot be characterized as having a special limited purpose.
>
> * * *
>
> [U]nlike *Salyer*, the *financial burden* of operating the District *does not fall* entirely or even primarily *on landowners; it falls* instead *on the purchasers of electricity*. J.S.,[6] pp. A-5, 6 (emphasis added).

The Court of Appeals meticulously scrutinized the activities of the Salt River District in accordance with the holding of the Court in *Salyer*.

Although many special purpose districts carry on their limited activities far from the general population, the Court of Appeals properly recognized that the Salt River District provides essential public services. The Court of Appeals correctly observed that the Salt River District is engaged in "far-reaching electric power operations. It is the second

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[6] "J.S." refers to the Jurisdictional Statement.

largest electric utility in the State of Arizona and services nearly a quarter million persons." J.S., p. A-5.[7]

Unlike the water district in *Salyer,* the Salt River District is not concerned solely with providing water for agriculture. "Its formerly rural area encompasses today eight Arizona municipalities, including major portions of

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[7] Appellants' explanation of the District's power functions severely distorts its independent status under Arizona law. The District's electric system, which generates 98% of its total revenues, Facts ¶ 46, is completely independent of its irrigation activities (except the 4% of the District's capacity which is generated by hydro-electric power). The District has the express statutory authority under Arizona law to sell power without regard to water delivery.

One of the specific purposes for which agricultural improvement districts may be organized is to "*provide power ... for the use of the owners or occupants of the lands.*" A.R.S. § 45-903(A)(6) (1956) (emphasis added.) Thus, unlike the ancillary or incidental flood control activity of the Tulare Water District, the Salt River District has statutory authority to engage in electric operations completely independent of its water activities. Additionally, the Board of Directors is expressly granted broad power to secure energy sources such as "coal, oil, gas, oil-shale, uranium and other nuclear materials, hotwater, steam and other geothermal materials or minerals, solar energy, wind, water and water power" outside of Arizona to serve the District's electric customers. A.R.S. § 45-935(B) (Supp. 1979). Thus, the District's legal authority to carry on its electric operation serving 240,000 customers, Facts ¶ 46, 85% of whom live within its boundaries, *id.*, is founded in an express and independent grant of statutory authority.

The so-called "business" purpose of the District's power activities is restricted to power generated by its hydro-electric facilities. *See* Exh. H, § VII (A). The authority of the District to build and operate steam generating plants is not derived from its reclamation activities, but rather the statutory grant of power under Arizona law. Letter from Moody R. Tidwell, III, Associate Solicitor, Division of Energy and Resources, Department of Interior, to State Sen. Morris Farr (August 24, 1976). Indeed the Articles of Incorporation of the Salt River Valley Water User's Association indicate that it had no authority to build electric plants without regard to irrigation. *See* Exh. A. Had the Arizona Legislature not authorized agricultural improvement districts to sell electricity independent of water operations, the Association as manager of the federal reclamation project, could never have embarked on the ambitious expansion program initiated by the District.

Even if the Court of Appeals was mistaken about the complex legal relationships surrounding the District, the court correctly applied *Salyer* on the facts as it understood them.

Phoenix. . . . In view of the broad scope and impact of its activities, the Salt River District cannot be characterized as having a special limited purpose." J.S., p. A-6.

After discussing the first of the two-prong analysis under *Salyer*, the Court of Appeals examined whether landowners disproportionately assumed the expense of District operations. With respect to the water operations, "[u]nlike *Salyer*, nearly 40% of the water delivered by the District is used and paid for in a manner unrelated to agriculture or landownership.[8] As to the electric operations, nearly all the citizens in the district are vitally affected in ways unrelated to ownership of real property. . . . Ninety-eight percent of the District's substantial revenues are produced by its electric utility operations." *Id.* "In view of the magnitude of the electric utility operations and the large percentage of water services which are used and paid for in a manner unrelated to land ownership, it would elevate form over substance to characterize the District as functioning solely for the benefit of landowners." *Id.* at A-7.

Thus, the opinion of the Court of Appeals is predicated exactly on the standard set forth in *Salyer*. In *Salyer* the Court looked at who "benefited" from the water district's activities and who was financially "burdened." 410 U.S. at

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[8] Although appellants describe this statement as "something of a mystery," they do not expressly dispute this conclusion. The appellants argue that the "use to which this water is placed once it is delivered . . . is of no concern to the District. . . ." J.S., p.12. It "merely stores, conserves, and delivers water that belongs to other people." *Id.* at 11. Therein, however, lies the telling distinction between the Salt River District and the water district in *Salyer*. In *Salyer*, water was stored and delivered for *agricultural* purposes. Here the beneficiaries are not only agriculture, but schools, homeowners, business and the hundreds of thousands of residents of central Arizona who depend upon the District for a reliable water supply.

729-31. Because the benefits and burdens of the Salt River District's activities and functions do not track landownership, the Court of Appeals should be sustained and its opinion affirmed.

II. THE DISTRICT'S VOTING SYSTEM FAILS TO MEET A STRICT STANDARD OF REVIEW.[9]

Because the District is not a special-purpose district as described in *Salyer,* the Court of Appeals applied the strict standard of review called for in *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). Applying that standard, the

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[9] The District's voting system would not even meet the test of reasonableness. In the proceedings below, the District claimed its acreage-voting system is reasonable since (1) it permits voting on a "debt-proportionate" basis, and (2) it connects voting strength to water use. Even under the more lenient rational basis test the acreage-voting system is unconstitutional. As the Court held recently, even in special district elections, the "classification of voters into 'interested' and 'non-interested' groups must still be reasonably precise, . . ." *Lockport v. Citizens for Community Action,* 430 U.S. 259, 266 (1977).

The District's voting system is essentially based upon a so-called "debt-proportionate" system. Under A.R.S. § 45-1047 (1956), District general obligation bonds are considered to be a lien upon real property in the District. Debt-proportionate voting is based upon the principle expressed by the District in a March 18, 1969, Resolution. "[T]he privilege of voting is commensurate with the burden of debt; that is, the more land a person owns and puts forth as collateral, the more he has at stake, and the greater influence he has in Project affairs." Exhibit Q, p.3.

The voting system, however, does not achieve the goal of authorizing voting commensurate with debt since all landowners may not participate in District elections in proportion to land owned. Only land owned by persons otherwise qualified to vote is eligible to be voted. A.R.S. § 45-909 (1979 Supp.). Land owned by corporations, trusts or partnerships, for example, is "burdened" with the debt of general obligation bonds but such lands are excluded from voting. For example, of 236,482 acres in the District, only 141,474 acres are eligible to be voted in the elections. Facts ¶¶ 35, 38. The lien on District lands presumably burdens all landowners, not simply landowners who are otherwise qualified electors. Thus, the goal of allowing those to vote in proportion to the debt on their land is clearly frustrated by restricting voting to only 60% of landowners. (footnote continued on page 10).

Court of Appeals properly considered whether nonproperty owners are substantially affected by the District's activities. *City of Phoenix; Cipriano v. City of Houma,* 395 U.S. 701 (1969).

The differences between the interests of nonproperty owners and the interests of property owners are not sufficiently substantial to justify excluding the former from the franchise. The claimed risk to appellants' property, J.S., p. 24, is not considered a sufficient compelling interest to justify excluding nonproperty owners from voting and has been specifically rejected by the Court in *City of Phoenix, supra.*

A.R.S. § 45-1047 (1956) provides that District general obligation bonds are a lien on property within the District. Presently this indebtedness amounts to approximately $1,221 per acre. Facts ¶ 49. (The value of the District's capital investment is about $3,500 per acre. Facts ¶ 54.). The lien on District lands is similar to the financial interest claimed by property taxpayers in *City of Phoenix.*

(footnote continued from page 9)

In *Salyer* the Court specifically found that *all* landowners, both corporate and individual, were extended the franchise. 410 U.S. at 730. It is obviously inconsistent to argue that "entrepreneurial risk" should be rewarded with absolute voting strength yet exclude business-owned property from participation. *Stewart v. Parish School Board of Parish of St. Charles,* 310 F. Supp. 1172, 1178 (E.D. La. 1970), *aff'd,* 400 U.S. 884 (1970). Thus, the exclusion of business entities from the District's voting scheme demonstrates conclusively that the so-called "debt-proportionate" voting system does not achieve its purpose of allowing voting commensurate with land ownership.

The acreage voting system also bears little relation to the water delivery functions of the District. *The appellants permit voting regardless of whether the voter actually uses District water.* In other words, the owner of a commercial acre of land has the same vote as the owner of an agricultural acre. If a purported basis of the voting system is to connect voting to water use, it is irrational to permit voting without any inquiry whatsoever as to whether or not the voter does in fact use District water.

City of Phoenix general obligation bonds are secured by the general taxing power of the City. Since property tax payments are relied upon to make debt service payments if other revenue sources are insufficient, general obligation bonds were considered by the Court to be in effect a lien on the real property subject to taxation. In *City of Phoenix*, the Court concluded, however, that the interests of non-property owners in the bond elections were not substantially different than the interests of property owners. The Court held that all residents of Phoenix have a substantial interest in public facilities and the availability of city services. 399 U.S. at 209.

Similarly, all residents of the District have a substantial interest in the electric service and water which it provides. *Cipriano v. City of Houma, supra.*[10] All citizens, whether they purchase electric service from the District or not, are affected by its electric operations, since they purchase services and products from others who do buy energy from the District. Even in those District areas served by Arizona Public Service Co., the District sells A.P.S. its power requirements. Facts ¶ 47. Certainly, all citizens are interested in assuring that the District continue to supply power to the Valley without interruption.

Also as in *City of Phoenix*, other revenues are available to meet the District's debt service obligations. District electric revenues have always been adequate to meet debt service assessments. According to the District:

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[10] "Of course, the operation of the utility systems — gas, water, and electric — affects virtually every resident of the city, nonproperty owners as well as property owners. All users pay utility bills, and the rates may be affected substantially by the amount of revenue bonds outstanding. Certainly property owners are not alone in feeling the impact of bad utility service or high rates, or in reaping the benefits of good service and low rates." *Cipriano v. City of Houma, supra* at 705.

> In all years to date, revenues . . . have been more than sufficient to meet all debt service requirements and the District has never used its taxing power for the Prior Lien Bonds. [general obligation bonds]

Exh. K, p.36. There is nothing to show that the financial health of the District will change. *See City of Phoenix, supra* at 212. Thus, since it is District electric customers who will ultimately satisfy the debt service requirement, they have a great interest in the outcome of District elections.[11]

The connection between land ownership and the District's water operations is likewise not substantially different than the impact of the water operations on all residents of the District. Almost two-thirds of city water used in the Phoenix metropolitan area is delivered by the District. Facts ¶ 42. About 25% of the water delivered by the District is for municipal uses; about 15% is for other non-agricultural uses. Facts ¶ 74. It is indisputable that all city residents, regardless of property ownership, rely upon a continuous and reliable supply of water from the District. Thus, all residents are substantially interested in District actions and therefore the Court of Appeals correctly held that restrictions on the franchise are impermissible.

III. REGARDLESS OF ITS ASSERTED "BUSINESS" CHARACTER, THE DISTRICT'S VOTING SYSTEM IS NOT IMMUNE FROM CONSTITUTIONAL SCRUTINY.

Section II of the Jurisdictional Statement advances the novel constitutional theory that public entities may be created with all the attributes of sovereignty and act in a manner which vitally and significantly affects people's lives, and yet be completely insulated from the traditional electoral process. Although appellees dispute the asserted

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[11] General obligation bonds, secured by District lands, were discontinued in 1972. Facts ¶ 49. Since then, the District has sold revenue bonds which are secured by a "pledge of revenues." *Id.*

profit-making purpose of the District,[12] in this section such a characterization will be accepted as true.

Putting all of the rhetoric about entrepreneurial risk aside, in appellants' words, "[t]he net effect of the Arizona Legislature's acreage-based board representation, therefore, is a subsidy for water users." J.S., p.21 n.10. Appellants fear that when agricultural interests no longer dominate the District's board, there may be some adjustment in the level of the subsidy.[13] It is, of course, constitutionally impermissible to deny people the franchise based upon speculation as to how they might vote. *Carrington v. Rash,* 380 U.S. 89 (1965).

The fallacy of appellants' position, however, is that the Court is not satisfied with the labels attached to governmental action but rather it examines the manner in which government affects people's lives.

> [T]he Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.

Gomillion v. Lightfoot, 364 U.S. 339, 344-45 (1960). The prerogative of the federal courts to review the constitutionality of voting schemes purporting to protect the interests of special segments of society is implicit in *Salyer.*

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[12] See Footnote 7, *supra.*

[13] Faced with growing public pressure over the water subsidy, the District board increased water charges from 30% to 88% in 1976. Facts ¶ 71.

Accepting the appellant's protestations that their activities are purely pecuniary,[14] the District could be viewed similarly to the water district in *Salyer*. But the Court in *Salyer* did not blindly put its imprimatur on the land-based voting system just because 85% of the land was owned by four corporations and the business-purpose of the water district was quite apparent. To the contrary, the Court examined the water district's activities and only after finding that it indeed did have a special, limited purpose and its activities did primarily affect landowners did it apply the reasonableness standard. Thus, the Court did not propose to exempt the affairs of the water district from public accountability simply because its activities served business interests.

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[14] Modifications to the District's one acre, one vote system, already implemented by the Arizona Legislature, significantly erode the appellants' contentions.

Until 1969, voting in District elections was restricted to owners of a minimum of one acre of real property, with owners of more than one acre entitled to votes equal in number to the acres owned. In response to a threat of a lawsuit by local municipalities challenging that voting system, the District agreed to support the voting of fractional acres and the Legislature subsequently amended the law to so authorize. 1969 Ariz. Sess. Laws, Ch. 134, § 2, *amending* A.R.S. § 45-983 (1956). According to a resolution adopted at the time by the District, the change in the voting system was designed to acknowledge the increasing urbanization of the District's area. Exh. Q.

In 1976, the District again supported amendments to the same statutes, this time expanding the Board to add four at-large members to be elected by property owners-one property owner, one vote. 1976 Ariz. Sess. Laws, Ch. 83, § 5, *amending* A.R.S. § 45-965 (1956).

> Mr. Jon Kyl representing the Salt River Project testified that S.R.P. supports the bill as it came out of the House. He said the bill would reduce the cost of power and give more representation to the homeowners who are served electricity by the S.R.P.

Arizona State Senate Natural Resources Committee, Minutes (May 25, 1976).

Thus, there have been periodic legislative inroads into the strict one acre, one vote standard.

Once the State of Arizona elected to establish a political subdivision to carry out certain activities, the constraints of the Constitution were invoked. The Court of Appeals correctly described the issue as whether

> having made the decision to create the entity and provide for the election of its directors, the state can deny the electoral franchise to citizens whose economic interest and natural environment are vitally affected by the entity's operations.

J.S.,p.A-8. Thus, even accepting appellants' contentions as true, their acreage voting system is still subject to constitutional scrutiny.

Admittedly, when the reclamation project was formed in 1903 and the District organized in 1936 our community was predominately agricultural. Landowners were no doubt the intended beneficiaries of the District's activities and the financial burdens fell predominately on them. The many references from the Stipulated Statement of Facts referred to by appellants reflect this historical truth.

But over the years our community rapidly became urbanized. The District's predecessor, the Water Users' Association, had 21 electric customers in 1921; Exh. K, p.A-5. Now, of course, the District is the second largest electric utility in Arizona and the seventh largest publicly-owned utility in the country. Despite the District's historical purpose and characterization by the Arizona Supreme Court, the constitutionality of its voting system must be measured against the manner in which it affects people's lives today. *Brown v. Board of Education,* 347 U.S. 483, 492-93 (1954). Regardless of how Arizona chooses to characterize the District, "the Constitution is concerned with the practical consequences, not the formal categorizations, of state law." *North Carolina v. Alford,* 400 U.S. 25, 37 (1970).

Appellants are correct that the State of Arizona must be free to make economic choices and obviously may grant subsidies to certain segments of our community. J.S., p. 21. Appellants are incorrect to assume that when special favors

are to be distributed through activities of governmental bodies, subject to the electoral process, the states may act in a manner oblivious to the Constitution. When the functions of local government impact in significant ways on people's lives, the Constitution requires equal access to the ballot. What makes constitutional sense in a remote agricultural water storage district takes on the trappings of feudalism in an urban, metropolitan community.

CONCLUSION

The Salt River Project Agricultural Improvement and Power District is unique among local units of government in this country. It is unique because of its critical role in supplying essential energy and water service to one of the fastest growing metropolitan regions in the United States. The Court of Appeals recognized that under the Court's opinion in *Salyer*, acreage voting in such a situation must be viewed according to traditional equal protection standards. The Court of Appeals faithfully applied *Salyer* and its opinion is not inconsistent with decisions of this Court or any other court. Because the issues presented by appellants are so unsubstantial, the opinion below should be affirmed.

Respectfully submitted,

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June 6, 1980

In The

Supreme Court of the United States

October Term, 1979

No. 79-1740

GERMAIN H. BALL, et al.,

Appellants

vs.

ROLAND W. JAMES, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellees' Motion to Affirm, rather than showing the questions presented to be unsubstantial, makes even clearer the novelty of the lower court's decision and its great practical significance to the owners of 236,000 acres of water-dependent land in the District. Appellees do not dispute that this decision destroys Arizona's historic water policy (reiterated most recently by the legislature in 1976, after this case was decided in the trial court) of inducing collective water reclamation efforts supported by proprietary sales of electricity. This disruption of state reclamation policy, as well as the massive forfeiture of agricultural property values which will be worked by the Court of Appeals' decision, make it imperative that the ultimate judgment on the constitutionality of this state statute should rest with this

Court, rather than upon the precarious decision of only two of the four lower federal judges who have passed on this case so far.

The Appellees rely on three differences between this case and *Salyer:* (1) the Salt River Project is larger; (2) the water owners it now serves are not all farmers; (3) it sells electricity. None of these has any relevance to the *Salyer* dividing line between those governmental units that exercise general governmental authority and those whose stewardship is limited. Neither the size of the District nor the number of waterusers has anything to do with the specialty or generality of function; and neither does the sale of electricity as a means of subsidizing water conservation and reclamation.

Even if the Project were engaged in two independent enterprises, water and electricity, it would not be a general governmental unit.[1] But that is not this case. The stipulated fact—the controlling fact—is that the sale of electricity was undertaken, not for its own sake, but for the primary purpose of reducing cost of water delivery. The Appellees would recant this stipulation—arguing that while Paragraph 17 of the Facts identifies the primary water purpose of the Salt River Reclamation Project and the Salt River Valley Water Users' Association, it does not refer to the District. (Motion to Affirm, p. 3 n. 2). The paragraph of the Facts specifically identifying the identical primary purpose of the District is paragraph 34:

> The District was organized for the purpose of continuing the operations of the Association, the principal objective of which was to provide water for use within the geographic boundaries the Association and District

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[1] *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973); *cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

> .... The primary legislative purpose of the District is to provide water to District lands. (Facts ¶34, App. C-14.)[2]

Once the focus shifts from the Project's acknowledged size and location to what it does, it is apparent that this is a *Salyer* case. *Salyer* held that it is the district's primary purpose which controls. In *Salyer*, the district engaged in more than one function. Indeed, the principal complaint in the case was that the *Salyer* district should not have subordinated its flood control activities to its water delivery activities. The controlling fact, nevertheless, was that "its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin." 410 U.S. at 728. The same is true here. The District's "primary purpose, indeed the reason for its existence", is, as in *Salyer*, conservation, storage, and distribution of water. The sale of electricity is adjunct to it.

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[2] In an attempt to find some support for their argument that water and power activities of the District are unrelated, the Appellees argue that Ariz. Rev. Stat. Ann. §45-903A6 (1956) gives the District the legal authority to undertake power activities independent of financial support to primary water activities. (Motion to Affirm, p. 3 and p. 7 n. 7).

Having stipulated that the District's power activities are *in fact* undertaken to provide financial support to its water activities, however, Appellees cannot and do not contend that the District actually sells power under subsection A6 of the statute. The only case interpreting the District's power activities states, as does ¶34 of the Stipulated Facts, that it is under §45-903A7 that this District sells power—the statutory subsection authorizing power sales to reduce the cost of water delivery "to the owners of the lands." *See Uhlmann v. Wren*, 97 Ariz. 366, 401 P.2d 113 (1965).

The disproportionate effect on landowners is equally apparent. It is difficult to conceive how any district could affect any group more disproportionately than the Salt River Project affects landowners. Ironically, the disproportionate effect upon landowners is the very reason the Appellees brought this lawsuit in the first place.

The Motion to Affirm refers to entities which are "... created with all the attributes of sovereignity and act in a manner which vitally and significantly affect people's lives ...." (Motion to Affirm, p. 12). The implication that this District has "all the attributes of sovereignity" is nothing less than astounding. What attributes of sovereignity? The fact that it sells electricity? The fact that it sells it to many people, some of whom live in cities? The district has no general taxing power; it has no power to enact rules governing people's conduct or to impose punishments; it has no authority over streets, fire and police protection, schools and hospitals. Out of the spectrum of prerogatives that constitute "all the attributes of sovereignity", the District has only a very narrow slice taken from the same part of the spectrum that can be exercised by either municipal or private entities. Its purpose for being is water conservation and, even as to water, it does not own, sell, or treat water.[3]

Equally significant is the assertion that the District's activities "vitally and significantly affect people's lives ...." (Motion to Affirm, p. 12). Of course they do, in exactly the same way that Arizona Public Service or any other electric utility affects people's lives.

This characterization of importance epitomizes the approach taken by the Appellees and the Court of Appeals: if the customers become numerous enough, then the customers are entitled to control. This is at direct odds with

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[3] Appellees again refuse to acknowledge the fact that the District's water function is nothing more than delivery of untreated water to landowners who own the water. For example, compare Motion to Affirm p. 12 with Facts ¶¶40, 41, 75; App. C-17-18, 31.

Salyer, whose basic principle is that as long as a district's authority is limited in scope,[4] choice of systems of control will be left to the judgment of the legislature, as long as the judgment is reasonable.

This is one of those rare cases in which Appellants are entitled to review as a matter of right.[5] In any event, the issues are clearly substantial, and jurisdiction should be noted.

Respectfully submitted,

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June 12, 1980

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[4] The reason for the decision in *Cipriano v. City of Houma*, 395 U.S. 710 (1969), was not that the city of Houma sold electricity. It was that Houma is a city, possessing all the "attributes of sovereignity".

[5] See Jurisdictional Statement p. 16 n. 8.

No. 79-1740

In The
Supreme Court of the United States

October Term, 1980

GERMAIN H. BALL, et al.,

Appellants,

v.

ROLAND W. JAMES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Constitution entitles electric customers to proprietary and voting control of a water reclamation district that sells electricity to support reclamation but whose powers, functions, and relationships between entrepreneurial risk and voting control differ in no material way from those of a privately owned electric utility.

2. Whether, under this Court's decision in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), the test for determining the constitutionality of special district elections continues to turn on the nature of the district's functions and the disproportionate effect of its activities on landowners as a group, or whether the test now depends on subjective judicial assessment of the size of the district and the number of its customers.

GERMAIN H. BALL, ALEX M. CONOVALOFF, BILL ROUSSEAU, LEO C. SMITH, JOHN M. WILLIAMS, THOMAS P. HURLEY, JR., WILLIAM P. SCHRADER, JOHN S. HOOPES, W. LARKIN FITCH, and THOMAS J. FINLEY, in their capacity as members of the Board of Directors, Salt River Project Agricultural Improvement and Power District, and KARL F. ABEL, in his capacity as President of the Salt River Project Agricultural Improvement and Power District,

Appellants,

vs.

ROLAND W. JAMES, JAMES R. FITZSIMMONS, DWIGHT M. BRAHS, FRANK SACCO, and JOHN H. MAFFEO, on behalf of themselves and their respective classes,

Appellees.

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No. 79-1740

In The
Supreme Court of the United States

October Term, 1980

GERMAIN H. BALL, et al.,

Appellants,

v.

ROLAND W. JAMES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLANTS

OPINION BELOW

The opinion of the Court of Appeals (J.S. App. A) is reported at 613 F.2d 180.

JURISDICTION

The judgment and opinion of the Court of Appeals were entered on October 12, 1979. The petition for rehearing, timely filed, was denied on February 6, 1980. A notice of appeal to this Court was filed on February 13, 1980. The Jurisdictional Statement was filed and the appeal docketed in this Court on May 2, 1980. Probable jurisdiction was noted on October 6, 1980. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Arizona Revised Statutes §§ 45-909 and 45-983 provide as follows:

§ 45-909. Qualifications of electors

No person shall be entitled to vote at any election held under the provisions of this chapter unless he possesses all the qualifications required of electors for state officers under the general election laws, and is the owner of record of real property located within the boundaries of the district as of sixty days preceding a district election, and on which he has been assessed for county taxes as shown by the county tax roll next preceding the date of the election.

§ 45-983. Acreage system of voting

A. The petition for organization of the district may provide that each owner of land shall have one vote, or may provide for voting on an acreage basis.

B. Except as provided in § 45-965, subsection D, if the district is or has been organized under a provision for voting on an acreage basis, each landowner possessing the qualifications of an elector shall be entitled to cast one vote at all elections after the organization election on each office to be filled, or each question submitted, for each acre of land within the district owned by him.

C. Except as provided in § 45-965, subsection D, from and after the effective date of this act each landowner possessing the qualifications of an elector who owns less than one acre of land within the district shall be entitled to a fractional vote on each office to be filled or each question submitted. The fractional vote shall be equal to the fraction of an acre owned by such elector.

D. If land is held in more than one name, each owner otherwise possessing the qualifications of an elector may vote the number of acres or fractions thereof represented by his legal interest or proportionate share of and in the lands.

E. The result of each election shall be determined by a majority of the acres voted as provided in subsections B, C and D of this section.

F. The district shall maintain a record of the persons owning real property within the boundaries of the district as such ownership appears on the records of the county recorder and the number of votes or fractions thereof the owner thereof shall be entitled to vote.

STATEMENT OF THE CASE

A. Nature of the Case.

This appeal involves the constitutionality of the acreage-based election procedures of one of the nation's oldest and largest federal reclamation projects. The District Court held these procedures constitutional, and the Court of Appeals in a divided opinion held them unconstitutional.

The Salt River Project stores and delivers untreated water to the owners of the water. Those owners of water are the landholders of 236,000 acres located in Central Arizona, including part of what is now the Phoenix metropolitan area. Over the 78 years of its existence, the primary purpose of the Salt River Project has been the storage, conservation, and delivery of water. The Project does not own the water, nor does it treat it. It merely stores and delivers water belonging to others. In every case, ownership of the water—and therefore entitlement to delivery by the Salt

River Project—is tied directly to land ownership.[1]

For the purpose of subsidizing its water operations, "following the longstanding reclamation principle, electric revenues . . . are used to support water and irrigation operations, thereby keeping water delivery charges at reasonable levels. At the same time, the [Project] maintains rates for the electric service it provides which are comparable to those of neighboring utilities." (Exhibit K, p. 4, of Facts).

Since it is a federal reclamation project, title to many of the Salt River Project properties is vested in the United States. In addition, the Secretary of the Interior has ultimate supervisory powers over it. (Facts ¶59, J.A. 40). Since 1917, however, the Project management has been the responsibility of either the Salt River Valley Water Users Association (Association) or, since 1937, the joint responsibility of the Association and the Salt River Project Agricultural Improvement and Power District (District). The Association is a private corporation organized under the laws of the Territory of Arizona, and the District is an agricultural improvement district, a special district denominated a political subdivision of the State of Arizona. It is the Board of Directors of the District whose election is at issue here.

B. Historical Background.

The District's landowner-based voting system is grounded generally in federal reclamation law and history and more particularly in the history of irrigation and reclamation in the Salt River Valley.

Agricultural development of the Valley began in the 1860's. A fertile but arid land whose usefulness has always depended on an adequate water supply, its development reached a barrier by the turn of the century. The farmers of

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[1] Stipulated Statement of Facts ¶¶ 39, 41, and 43, J.A. 33-35. The Stipulated Statement of Facts (Facts) is reproduced in the Joint Appendix and as Appendix C to the Jurisdictional Statement. The balance of the Record consists of Exhibits A-Z, AA, and BB to the Stipulated Statement of Facts.

the Valley, who were attempting to irrigate approximately 150,000 acres of land by diverting water from the Salt River through canals, were unable to control the erratic flow of the River. A long drought in the 1890's had significantly reduced the River's flow. At other times recurring floods washed out brush diversion dams, interrupting delivery of water to the lands to which it had been appropriated. It was apparent that cooperative action to store the waters of the Salt River and to insure a dependable supply of water for agriculture was necessary to further development of the Valley.[2]

In 1895, some farmers in the Salt River Valley formed the "Farmers Protective Association," for the primary purpose of securing legislation favorable to their interests. Salt River Valley farmers were in fact instrumental in securing the passage of the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.* (Facts ¶5, J.A. 21). Under that Act, the United States advanced interest-free funds to purchase and construct integrated systems of reclamation works, to be repaid by the owners of the lands benefited.

The Salt River Project, authorized by the Secretary of the Interior on March 14, 1903, was one of the earliest projects created under the 1902 Act.

The potential for generating and selling hydroelectric power in connection with reclamation projects led Congress in 1906 to authorize sale of power "wherever . . . an opportunity is afforded for the development of power under any project". 43 U.S.C. § 522. Almost from its beginning, the Salt River Project has generated and sold electric power incident to and in support of its primary water activities. (Facts ¶¶ 12 and 17, J.A. 24, 25). These activities include

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[2] See Facts ¶5, J.A. 21. The Court's opinion in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), authored by Mr. Justice Rehnquist, recounted in detail the "peculiar problems of adequate water supplies" in the Western part of the country which led to the creation of special purpose water districts. 410 U.S. at 721-23. The discussion is pertinent to this case as well.

water conservation, thereby making more water available to all of its users. (See Exhibits L, M, N, O, and P of Facts). Because of the scarcity of water in Arizona, water conservation is central to a broad range of public policy issues facing Arizona's policy makers. The water conservation benefits generated by electric sales inure to all Project lands, agricultural and residential alike.

The Salt River Valley Water Users Association was formed in 1903, as the legal entity that could satisfy the requirement of the 1902 Act that Project water users repay to the United States the costs of constructing and augmenting reclamation projects. The Association's Articles of Incorporation were drafted in cooperation with officers of the Federal Reclamation Service. The Articles give the subscribed lands the right to delivery of federal reclamation water in proportion to acreage. They further authorize acreage-proportionate stock assessments to meet the Association's income needs. Those stock assessments become a lien on the subscribed lands until paid. The articles also provide for ownership and voting rights in proportion to acreage subscribed into Association membership. (Facts ¶8, J.A. 22, and Exhibit A to Facts).

Only persons who subscribed their lands into Association membership—with the accompanying burdens and risks to themselves and their lands—are entitled to participate in the benefits of the Project. The landowners also made substantial cash investments in the form of acreage stock assessments, which became especially burdensome in the 1920's and 1930's. (Facts ¶19, J.A. 25-26). Thus the "risk capital" for the creation of the Salt River Project was the money and lands of the subscribing farmers. Those lands and their owners were also the intended beneficiaries of the Project's activities, if successful.

Over the years since the Project's initial creation, changes have occurred in the way its purpose is achieved. Probably the most significant change is that the landowners incurred further risk to impound additional waters and to

create an electric system for the purpose of enhancing revenues. But the purpose has always remained the same: to conserve and deliver water at low cost to lands whose owners were willing to provide the capital for this water reclamation project. (Facts ¶¶ 16, 17, 32, 34, J.A. 24-25, 31). Their lands have in fact benefited. "Because of the assurance of this indefinite supply of water, the assessed valuation of agricultural lands within the District and the Association is generally twice the assessed valuation of comparable agricultural lands outside the boundaries of the District and the Association." (Facts ¶55, J.A. 39).

In 1917, the Association and the United States entered into a contract obligating the Association to operate and maintain the Project as agent for the Government. (Exhibit C to Facts). The agreement requires the Association to maintain all works in proper operating condition and to deliver water to those entitled to it. (¶3 of Exhibit C to Facts). It may return the Project to the United States for any reason on March 1 of any year upon one year's notice. The United States may resume operation of the Project should the Association fail to carry out the law or the terms of the contract. (Id. ¶19).

The Association operated the Project directly from 1917 to 1937. In the 1920's and early 1930's, the Association heavily encumbered shareholders' lands to construct additional dams and other works in the Project. (Facts ¶¶ 13, 14, J.A. 24). During the Depression, the Association faced the need to reduce its borrowing costs for the financing of the new dams. Creation of a special district which could issue bonds, the interest on which would be free from income taxation, seemed to provide the solution. Arizona's Agricultural Improvement District Act of 1922 permitted the creation of special districts known as agricultural improvement districts within federal reclamation projects for the

purpose of developing and delivering water to the lands of the district. Since an agricultural improvement district is a political subdivision of the State of Arizona, the interest on its bonds is exempt from federal income tax.

Notwithstanding the tax and consequent bondmarketing advantages, many of the Association's shareholders objected to a proposal to form an agricultural improvement district as the vehicle for raising needed capital funds. One of the reasons was that, under the 1922 Act, voting for a district's Board of Directors would be per capita among landowners, rather than by acreage as in the Association. (Facts ¶21, J.A. 26). This would have meant that the landowners would bear the risk of bringing the District into existence without voting control proportionate to their risk, and many were unwilling to transfer to such an entity the Association's assets and powers of operating the Project. Representatives of the Association, therefore, requested the Arizona Legislature to amend the Agricultural Improvement District Act to conform the voting system of the Act to that of the Association. The Legislature enacted the necessary amendments in 1936. The Legislature also changed the *ad valorem* taxing power of such districts to an acreage taxing power to mirror the Association's stock assessment power. The District was created in 1937, with boundaries essentially identical to those of the Association.

It is undisputed that without acreage voting the Association would not have transferred title to its property and control of the Project to the District. (Facts ¶33, J.A. 31). Therefore, absent acreage voting, there would have been no District, and the ownership and control of both the power and the water systems (subject to Federal interests) would have remained in the Association.

Under an agreement made in 1937 and approved by the United States, the Association transferred its property to the District, subject to the paramount interest of the United States, and authorized the District to perform the Association's contract obligations as its agent. (Facts ¶¶ 24

and 32, J.A. 28, 31). The Association in turn agreed to continue to operate and maintain the Salt River Project on behalf of the District. (Facts ¶24, J.A. 28). As amended in 1944 and 1949, the contract now provides that the District itself directly operate the power and water storage functions, and the Association operates the water delivery system as agent for the District. Each acts as agent for the other. The net result is that since 1949 the District has operated the power activities and water storage activities and, through its agent the Association, the water delivery activities.[3]

All of these activities of both the Association and the District are carried out against the background of the stipulated fact that the primary purposes of the Salt River Federal Reclamation Project, the Association, and the District are the development, storage, and distribution of water for the irrigation of arid and semi-arid lands. (Facts ¶¶ 12, 16, 17, 32, 34, J.A. 24-25, 31). The development and sale of electrical power was undertaken by the Federal Reclamation Project, the Association, and the District, not for the primary purpose of providing electricity to the public, but rather to provide financial support to the Project's primary irrigation functions. (Facts ¶17, 34, J.A. 25, 31).

C. District Organization and Voting.

Originally, the method of electing the District's governing body—its Board of Directors—was the same as that used by the Association: one vote per acre. There have been two subsequent changes. In 1969, the Arizona Legislature amended the Agricultural Improvement District Act to permit the owners of less than one acre to cast a fractional vote, proportionate to their acreage. The practical effect of this change was to enfranchise medium and small landowners. The second change occurred in 1976 after the District Court had dismissed this suit. Before 1976, each of the ten directors was elected from a designated geographic electoral

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[3] The historical explanation for this arrangement is set forth in the Facts ¶25, J.A. 28-29.

§ 45-961A2 (1956)). The Legislature in 1976 enlarged the Board to 14 and provided that the four additional members were to be elected at large, with each landowner in the district having one vote.[4] In addition to its 14 Board members, the District also has a President and Vice President who are elected at large on an acreage basis. (Facts ¶26, J.A. 29).

The District and the Association have identical constituencies, identical purposes, identical management, and essentially identical boundaries. (Facts ¶31, J.A. 30). The Arizona Supreme Court has stated that the relationship between the two is one of "alter egos in substance, though not in law." (Facts ¶23, J.A. 27).

Thus, the Salt River Project—consisting of two alter ego entities, the District and the Association—began 78 years ago as a private stock corporation organized under the laws of the Territory of Arizona. This corporation, the Salt River Valley Water Users Association, later became the managing agent of the Salt River Reclamation Project for the United States. About two decades later, the District was formed. As a result of the District's political subdivision status, the interest on its bonds became tax free. The State in effect transferred to the Salt River Project the tax exempt quality of state and local governmental debt, a result that is achieved in more modern times for diverse businesses through the issuance of industrial development bonds.[5] Indeed, bonds whose interest is free from federal income tax because of Arizona statutes have been used for pollution control purposes by the State's other major electric utilities.[6]

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[4] Ariz. Rev. Stat. Ann. §§45-961 B, 45-963, and 45-983 (Supp. 1980).

[5] *See, e.g.*, Ariz. Rev. Stat. Ann. §§9-1151 *et seq.* (1977 & Supp. 1980).

[6] *See*, Ariz. Rev. Stat. Ann. §§9-1221 *et seq.* (1977 & Supp. 1980).

D. Power Functions as Proprietary Support for Water Development.

Applying power revenues to reduce water costs is a long-standing reclamation principle. (See 43 U.S.C. §§ 485(c), 522, 598, 501, and 825t; Ariz. Rev. Stat. Ann. §45-2201 Revisor's Note (Supp. 1980); See also Exhibit K to Facts, p.4). The Salt River Project is no exception. Over the last ten years, an average of $10 million per year from the District's power revenues has been applied to reduce water costs. (Facts ¶45, J.A. 36).

There is no question, however—indeed the parties have stipulated to the fact—that "the development and sale of electrical power ... was undertaken not for the primary purpose of providing electricity to the public but to support the primary irrigation functions by supplying power for reclamation uses and by producing revenues which could be applied to increase the amount and reduce the cost of water to Association subscribed lands." (Facts ¶17, J.A. 25).[7]

E. Water Functions.

The District and the Association service the water rights of more than 236,000 acres of assessed land through a system of six reservoirs with 2,072,050 acre-feet storage capacity, 131 miles of canals, 875 miles of laterals, and 263 miles of drainage or waste ditches. (Facts ¶44, J.A. 36).

Though large in size, the Project's water functions are narrow in scope. They are not analogous to the municipal water functions of a city. The District and the Association own no water. They do not buy or sell water. They do not treat water. They have no say over the use to which water is

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[7] The Arizona Supreme Court observed in *Uhlmann v. Wren*, 97 Ariz. 366, 392, 401 P.2d 113, 124 (1965), that the District's power activity could only be "an incidental phase of reclamation, not a primary or independent end in itself," because the only reason for sale of power is "the use of power revenue to support its primary irrigation and reclamation functions."

put. The Project only stores water behind its dams, minimizes water loss through conservation practices, and then delivers water through the Project canals to the landowners who own it. Therefore, the District and Association are not in the "water business" in the same sense that a city or water company might be in the water business. Their stewardship is over a federal reclamation project. The Project merely stores, conserves, and delivers water that belongs to other people.

Approximately 75% of the water delivered by the District is used by its owners for agricultural and other irrigation purposes. Included in that 75% is about 15% used for "non-agricultural but predominately irrigation uses, including parks, playgrounds, schools and subdivision irrigation." (Facts ¶74, J.A. 48). The other 25% is delivered to municipalities. The water delivered to municipalities falls into one of two categories. The categories are (1) water appurtenant to land owned by the cities, and (2) water appurtenant to land owned by city residents who have chosen not to take delivery directly from the Project and have allowed the cities to take delivery as their agents. The agency arrangements between those landowners and their cities are specified in contracts between the Association and the cities involved, under which the cities pay on behalf of those landowners the same assessments and water charges that those landowners would pay if they elected to take their water deliveries directly from the Project. (Facts ¶41, J.A. 34). Landowners who allow the cities to take delivery of their water may revoke their consent and resume taking their water themselves at any time.[8]

The lower court erroneously asserted that "nearly 40% of the water delivered by the District is used and paid for in a manner unrelated to agriculture *or land ownership.*" (J.S.App. A-6, 613 F.2d at 184, emphasis added). This factual assertion was key to the Court of Appeals' holding; the opinion later states: "In view of the magnitude of the elec-

[8] There are 8 such cities; see Facts ¶¶ 42, 75, and 82, J.A. 35, 48, 52.

tric utility operations and the *large percentage of the water services which are used and paid for in a manner unrelated to land ownership,* it would elevate form over substance to characterize the District as functioning solely for the benefit of landowners." (*Id.*, emphasis added).

This factual underpinning of the Court of Appeals' holding is flatly false. Every penny charged for handling Project water is based on land ownership, including all Project water delivered to cities. The parties have not only stipulated that entitlement to water is tied to land ownership (Facts ¶¶ 39 and 40, J.A. 33-34), they have also stipulated concerning the relationship between acreage voting and the existing rights and burdens of landowners. (Facts ¶43, J.A. 35).

The amount of water to which any landowner is entitled consists of two components: (1) normal flow and (2) stored and developed waters. Under Arizona law, all surface water rights are appurtenant to the land. Rights to the normal flow of the river are determined according to the time priority by which the river's waters were beneficially applied to the land. (See Facts ¶39, J.A. 33, and the Kent Decree referred to therein). Rights to stored and developed waters (above the normal flow of the river) are divided equally on an acreage basis among all Association-subscribed land. (Facts ¶¶ 39 and 40, J.A. 33-34). Thus, contrary to the Court of Appeals' assertion, normal flow water rights are approximately proportionate to acreage, and stored and developed water rights are exactly proportionate to acreage.

The Court of Appeals' statement that "the District is not concerned solely with providing water for agriculture" (J.S.App. A-6, 613 F.2d at 183) is correct but irrelevant. The District's function is the storage, conservation, and delivery of water to the landowners who own it in the amounts that they own. Both the entitlement to the water and also the amount of the entitlement depend exclusively on land ownership. The landowners' entitlement is to *water,* not to water for agricultural purposes. (Facts ¶40, J.A.

34). The use to which this water is put once it is delivered to its owners is of no concern to the District and has no relevance to the District's obligation to store and deliver water to cities, either in their own right as landowners or as agents for other landowners. The District has no power to dictate the use of any water.[9] The fact that cities or other owners may chose to treat and sell water after the district's delivery role is completed does not enlarge the limited nature of the District's function.

F. Power Functions.

The District is the second largest supplier of electricity in the State of Arizona, serving some 240,000 customers. (Facts ¶46, J.A. 36). The largest and third largest, Arizona Public Service Company and Tucson Electric Power Company, are both private corporations. (Exhibit K to Facts, p. 30). The District does not sell electricity to all areas within its boundaries, and it sells substantial electricity to persons outside its boundaries. (Facts ¶47, J.A. 37, and Exhibit Z to Facts). The District's boundaries were drawn virtually identically to those of the Association and of the Federal Reclamation Project. The sole criterion for those boundaries was whether the land could be benefited by agricultural irrigation, so town lands and high ground were excluded. (Facts ¶¶ 6, 38, J.A. 22, 32-33).

The District's power activities are, in effect, a business venture of the landowners to reduce the cost of water deliveries. (Facts ¶34; cf. ¶17; J.A. 31, 25). In a case involving the Salt River Project, the Arizona Supreme Court quoted from earlier decisions describing Arizona's irrigation districts and similar special districts as "purely business and economic and not political and governmental." *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power*

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[9] Under Arizona law, a public carrier of raw water must deliver the water to the lands to which it belongs and has no power to say who shall receive it, much less to say what may be done with it after it is delivered. *Slosser v. Salt River Valley Canal Co.*, 7 Ariz. 376, 65 P. 322 (1901); *Brockman v. The Grand Canal Co.*, 8 Ariz. 451, 76 P. 602 (1904).

District, 78 Ariz. 30, 41-42, 275 P.2d 393, 402 (1954). Viewed as a percentage of gross power revenues, the amount of District power revenues provided for water assistance is approximately equivalent to the dividends paid to common stockholders in comparable electric utilities. (Facts ¶56, J.A. 40). Its electric rates are also comparable to those of the State's two principal private electric utilities. (Exhibit K to Facts, pp. 4-30; Exhibit L to Facts, p. 1). In 1975, the year immediately preceding the Stipulation in this case, the annual agricultural water subsidy amounted to $8.89 per power customer. (Facts ¶84, J.A. 50). During that same year the amount of the subsidy for residential water came to $5.22 per power customer. (*Id.*)

The private investor puts his money at risk only because of anticipated profits. So also, these landowners, first in their capacities as shareholders of the Association and then in their capacities as electors of the District, put their money and their lands at risk to go into the electricity business for their own advancement as "the intended beneficiaries *inter alia* because electric revenues were to be used to reduce the cost of development, storage and distribution of water to District lands." (Facts ¶34; see also ¶17, J.A. 31, 25).

G. The District Has Only Limited Power.

Municipal-type powers enjoyed by the District are limited in number and in scope. The effect of state statutes, when read in light of other Federal statutes, is that the interest on the District's bonds is not subject to federal income tax. It is the same kind of benefit that many states confer upon a large variety of private corporations through devices such as industrial development bonds and pollution control bonds.

Arizona statutes also empower the District to impose an "acreage tax." This acreage tax applies only to member lands and is simply the mirror-image of the stock assessment power to which those lands were already subject by virtue of Association membership. The parties have stipu-

lated that "District taxes ... have the same effect as Association assessments." (Facts ¶ 22, J.A. 27). Therefore, the District's nominal acreage taxing power brought with it no real burdens, since all lands of the Disrict were already subject to the same duty by virtue of their voluntary subscription into the Association. Moreover, the District's acreage taxing power, if ever used by an acreage-voting constituency, would burden low density land far more than urban land. Therefore, the power is incapable of being abused to the unfair disadvantage of small landowners or non-landowners, and they need not fear it when in the hands of an acreage-voting constituency. (By contrast, an acreage taxing power in the hands of an urban electric customer constituency would be an instrument of great abuse of larger acreage, low density landowners.)

The District lacks those governmental powers that are the essential attributes of general government. The District cannot impose sales taxes or *ad valorem* property taxes. It cannot enact laws regulating the conduct of citizens residing within its boundaries. It has no authority to impose punishments for violations of any laws or regulations. It does not engage in any of the traditional functions associated with general governmental powers—streets, schools, sanitation, law enforcement, welfare or fire protection. The District has the power of eminent domain, but so do other private utilities in the State of Arizona. Ariz. Rev. Stat. Ann. § 12-1111 (1956). And, unlike all general purpose political subdivisions—indeed, unlike any other political subdivision in the State—the District makes *ad valorem* contributions in lieu of taxes on its property. Through the payment of these in lieu contributions, the District's electric operations are "in substance ... taxed by the State like any other privately-owned utility." (Facts ¶¶ 57 and 58, J.A. 40). The Arizona Supreme Court has repeatedly held, and has reiterated as recently as 1979 in *Neidner v. Salt River*

Project Agricultural Improvement and Power District, 121 Ariz. 331, 590 P.2d 447, that the District is essentially a private business venture whose public powers consist only of those necessary to carry out its business purpose.

H. Summary

The Salt River Project was brought into existence over three quarters of a century ago because landowners in the Salt River Valley put their lands and their money at risk in anticipation of enhancement of the value of those lands from the Project's water storage and delivery activities. Almost from the beginning, the water operations have been subsidized from the sale of electricity. This has been accomplished through electric rates competitive with those of private utilities, and the return to the landowners has been comparable to the return that would have been realized by private utility shareholders. The only difference is that the landowners opted to restructure their enterprise under a distinctive form of organization offered in the Agricultural Improvement District Act. The legislature has maintained a continuing interest in that form of organization and has frequently modified the statutes through which this development of water resources is encouraged and subsidized. As with any other business enterprise, the direct beneficiaries are the people whose assets made the venture possible. The customers, who purchase a service they desire, differ in no respect from customers of any electric utility.

I. The Proceedings Below.

This lawsuit was brought by persons living within the District as a challenge to the constitutionality of the statutes by which the District's directors are elected. On cross motions for summary judgment on stipulated facts the District Court held the statutory scheme constitutional and dismissed the complaint. By a divided vote, the Court of Appeals reversed the District Court's judgment. The Court of Appeals majority opinion focuses on the undisputed facts that the District is large and that its activities affect many people. In the language of the majority, "Although at one

time the Salt River District did bear some similarities to the District in *Salyer*, today the size and nature of the projects of the District and the effect of its operations on all of the residents of Arizona are more extensive than those of the district in *Salyer*." (J.S.App. A-5, 613 F.2d at 183). Judge Hall, in dissent, observed that "what the court is holding is essentially that the plaintiffs, solely because they are users, are entitled to participate in all of the benefits as owners in the management and operation of the defendant District." (J.S.App. A-11, 613 F.2d at 186).

Judge Hall was correct: the lower court majority in essence held that the Project's electric customers are entitled to control. The lower court's keying of control to the payment of electric bills is one of the two reasons its judgment must be reversed. The other reason is the majority's erroneous assumption that this Court's test in *Salyer* is based on size rather than function.

SUMMARY OF ARGUMENT

Over the 16 years since *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court has stated with consistent clarity that the strict judicial scrutiny rule of that case does not apply to all entities that carry a municipal label.

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973), marked out one set of circumstances in which the legislative determination will be upheld so long as it meets the highly deferential rational basis standard. This Court's decision in *Salyer* is the closest case to a squarely controlling precedent. Under *Salyer* the judicial examination of the District is twofold: the narrowness of its function and the disproportionality of its effect on landowners. Section II of the Argument discusses the *Salyer* standard and the reasons why that standard governs this case.

The distinctions between this case and *Salyer* are two. The Salt River Project District is larger than the district in *Salyer*, and it subsidizies its water conservation by the sale of electricity. Neither of the differences is relevant to the

constitutional test stated in *Salyer*, nor to any pertinent constitutional or policy considerations. The *Salyer* standard is keyed to the nature of the special district's function, not to its size.

The District therefore fits securely within *Salyer's* two part test. Moreover, there are factors in this case other than those relied on in *Salyer* which further militate in favor of the Arizona agricultural improvement district statutes. They are factors which relate to the nature of the plaintiffs' interests affected by the District. The standing of these plaintiffs to maintain this case or controversy rests on their status as electric ratepayers. Yet there is no distinction between the effects of this District on its ratepayers and the effects of any investor-owned utility on its ratepayers.

The appellees contend, as does the Court of Appeals, that since the ratepayers bear part of the financial burden of the Salt River Project, they should be entitled to control it. The financial burden borne by these plaintiffs as ratepayers is identical to the burden borne by the ratepayers of any electric company. The appellees make no financial contribution other than the payment of their monthly bills. Their sole financial stake in the enterprise is the cost of electricity and the stability of its supply. In addition to their economic interest, some of the plaintiffs might have an interest in such matters as District involvement in nuclear power and environmental controls. These are also indistinguishable from the interests of Arizona Public Service or Tucson Electric Power ratepayers.

If these appellee/plaintiffs are to succeed in overturning the policy choices of the Arizona Legislature, it must be because of some constitutional guarantee. Yet there is no constitutional value at stake which requires taking voting control away from the owners and giving it to the customers where the entity's effects on its customers are indistinguishable from those of any other investor-owned utility operated for the benefit of its owners. The identity of interest between the District's customers and other electric

customers, as well as the absence of any constitutional reason to give electric ratepayers control over a profit-making venture brought into existence by other people's risk, will be discussed in Section I of the Argument.

Section III discusses two lines of this Court's cases. In considering constitutional challenges to voting schemes, the Court has consistently reaffirmed that it is not only constitutionally permissible but also advisable for local governments to be creative in devising representational methods beyond traditional molds. In dealing with attempts to solve the unique problems of local government, this Court has rewarded rather than punished innovation.

Another line of this Court's cases has consistently accorded state legislatures a large measure of deference in determining economic policy, including the allocation of scarce resources. Both these lines of cases govern here. With respect to creativity and innovation Arizona's agricultural improvement district voter representation statutes are a unique legislative response to unique local problems. The cases prescribing broad deference to the legislature's judgment in economic matters are also controlling. The Arizona Legislature's authorization of landowner-created agricultural improvement districts represents an attempt to deal with some of the State's most fundamental economic issues. Moreover, what the Legislature has done in creating and periodically revising its agricultural improvement statutes is a lesser departure from one person, one vote prototypes than this Court has considered and approved in other cases.

ARGUMENT

I.

THE CONSTITUTION DOES NOT ENTITLE ELECTRIC CUSTOMERS TO PROPRIETARY AND VOTING CONTROL OF A WATER RECLAMATION DISTRICT THAT SELLS ELECTRICITY TO SUPPORT RECLAMATION BUT WHOSE POWERS, FUNCTIONS, AND RELATIONSHIPS BETWEEN ENTREPRENEURIAL RISK AND VOTING CONTROL DIFFER IN NO MATERIAL

WAY FROM THOSE OF A PRIVATELY OWNED ELECTRIC UTILITY.

Voting is a fundamental right when it is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Under this standard, electing directors of an entity whose effects on its customers are no different from those of a private business does not trigger the application of the one person, one vote doctrine.

A. Arizona Law Defining the Business Purposes of the District.

The District was formed in 1937 solely as a "municipal" overlay on the Association to render interest on its debt securities exempt from federal income taxation. (Facts ¶32, J.A. 31). The status of such water districts as essentially business corporations had been well established in Arizona long before the formation of the District in 1937. Speaking of the District in 1954 in *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 43, 275 P.2d 393, 402, the Arizona Supreme Court quoted with approval its earlier characterization given in 1925 to irrigation districts in *Day v. Buckeye Water Conservation and Drainage District*, 28 Ariz. 466, 474, 237 P. 636, 638:

> Their formation is purely business and economic, and not political and governmental. They are formed in each case by the direct act of those whose business and property will be affected, and for the express purpose of engaging in some form of business, not of government.

Since such districts were not municipal in substance, they were held to be exempt from a state constitutional prohibition against any "municipality, or other subdivision of the state" lending its credit to, or purchasing stock in, private corporations. *Day v. Buckeye Water Conservation and Drainage District, supra.*

Indeed, in 1940 the Arizona Supreme Court invalidated a state statute exempting irrigation district property from taxation. *State of Arizona v. Yuma Irrigation District*, 55 Ariz. 178, 99 P.2d 704. The exemption fell under a state constitutional prohibition against tax exemptions other than for state and "municipal" property. In direct response, Article 13 § 7 to the Arizona Constitution was adopted declaring certain improvement districts, including agricultural improvement districts, to be political subdivisions of the state entitled to the privileges of municipal corporations. "... Article 13 § 7 was added for the purpose of re-establishing the immunity [from state taxation]." *Taylor v. Roosevelt Irrigation District*, 71 Ariz. 254, 258, 226 P.2d 154, 156 (1950).

However, while the enactment of Article 13 § 7 of the Arizona Constitution gave the District and other improvement districts immunity from state taxation,[10] "the adoption of the constitutional amendment in no sense altered the inherent characteristics of the district .... [W]e experience no difficulty in determining that the appellee corporation is in essence a business corporation ...." *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 43, 275 P.2d 393, 402 (1954) quoting with approval from *Taylor v. Roosevelt Irrigation District, supra*. Concerning the District's status, the Arizona Supreme Court held that both before and after the constitutional amendment:

> The District's operations are conducted to enable it

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[10] This judgment of an earlier generation that the District should not pay taxes on its property did not withstand the test of time. By the early 1960's, public sentiment was that the District should pay the same property taxes on its electric facilities as other private utilities. Rather than amend the constitution solely to permit taxation of this District, the legislature provided in 1963 that the District could make voluntary contributions in lieu of taxes on its power facilities, which has been done since then. Ariz. Rev. Stat. Ann. §§ 45-2201 *et seq.* (Supp. 1980). Thus, it is stipulated: "In substance, the electrical facilities of the District are taxed the same as privately owned utility property." (Facts ¶57, J.A. 40).

> to 'function and accomplish the business and economic purposes for which it was organized'. *Local 266, I.B.E.W., supra*, 78 Ariz. at 43, 275 P.2d at 402.

The limited effect of the constitutional amendment was also clarified:

> 'We are of the opinion that the primary functions of these irrigation districts have not been changed by the Constitutional Amendment, supra, and in the conduct of their ordinary business, they are not exercising governmental or political prerogatives as they are not operated for the direct benefit of the general public but only of those inhabitants of the district itself.' (*Id.*)

Since it is a special district, the District bears a municipal label. In the services it provides and its effects on people's lives, however, the District is virtually indistinguishable from any other utility operated for the benefit of its owners. The District supplies electricity at retail to customers in Arizona. Arizona Public Service Company and Tucson Electric Power Company also supply electricity to retail customers in Arizona. The reason that Arizona Public Service and Tucson Electric Power are in the power business is that several decades ago investors were willing to put their property (money) at risk, and to leave it at risk from that time to the present in anticipation of a profit. Profits from the operations of those companies belong to their owners, the shareholders. Control is also vested in the shareholders. Those companies owe their existence to the Arizona corporation laws. It is Arizona law that allowed their investors to aggregate their risk capital with the inducement of electing the board of directors in proportion to their respective entrepreneurial risks.

Similarly, the reason that the Salt River Project is in the power business is that several decades ago property owners put their property (money and land) at risk and continue to

leave it at risk for the hope of beneficial return. (Facts ¶33, J.A. 31). Instead of dividends and stock appreciation, the return to the landowners is in the form of a water subsidy and increased land value.

Thus, Arizona has provided at least two statutory schemes by which property owners may put their property at risk in the generation and sale of electricity in anticipation of benefits to themselves. There is no less reason to protect the investment-back expectations of one set of property owners who place their assets at risk under the agricultural improvement district statutes than to protect the expectations of another set of property owners who placed property at risk under a different set of statutes dealing with stock corporations.

The state constitution and statutes *name* the District as a political subdivision enjoying the privileges of a municipal corporation. As has been shown above, these provisions have been authoritatively construed as not altering "the inherent characteristics of the district" as "in essence a business corporation." *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 43, 275 P.2d 393, 402 (1954). The mere labeling of the District as public should not be controlling of the constitutional question here. If an entity's real and palpable consequences to people's lives are not of a quality and weight sufficient to implicate constitutional liberties, then surely the mere naming as "political subdivision" or "municipality" should not tip the scales differently.

B. The Plaintiffs Complain Only of Consumer Effects.

The legislature's authorization of agricultural improvement districts reflects a focused economic policy choice to encourage private risk-taking for the development of water resources by authorizing power sales to help pay for that development. This purely economic nexus between power sales and water development has long been followed in the arid West and in the federal reclamation laws themselves.

See 43 U.S.C. §§ 485(c), 522, 598, 501 and 825t; *see also* Ariz. Rev. Stat. Ann. § 45-2201, Revisor's Note (Supp. 1980) and p. 11 n. 7, *supra*.

The plaintiffs' recitation of the "effects" upon themselves which they claim entitle them to control the District is unintentionally revealing. They say that the District has "all the attributes of sovereignty and act[s] in a manner which vitally and significantly affects peoples lives . . . ." (Motion to Affirm, p. 12). Yet when this hyperbole is stripped down to its specifics, both the plaintiffs' real view of the case and the fatal defect of that view are effectively disclosed. Their list of "effects," including those that pertain to the District's water storage and delivery activities,[11] speaks exclusively to economic and customer effects. They complain that they must pay for the electricity they purchase and that the planning and financing of the utility affects the pace and direction of economic development for the community. Their principal benefit in taking over the District would be from reducing power rates by neglecting the duty to capital now fulfilled by the water subsidy. (Facts ¶60, J.A. 41). For some, the grievances might also extend to such issues as participation in environmental controls and nuclear generation. In either case, the only kinds of activities to which the Appellees object or

[11] The District's function as a mere storer and deliverer of water belonging to others is discussed *supra*, pp. 11-14. The plaintiffs say they are "affected" by the District's water storage and delivery function. But their real complaint is with what the owners of the water (who are the individual landowners) or the owners' agents (the cities) choose to do with the water *after* the District has completed its function of storing and delivering the water according to established property rights. Plaintiffs say they are affected by the availability or non-availability of water. That is certainly true. As people desiring to buy water for domestic use, they are affected by the willingness of the owners of that water to sell and the terms of sale acceptable to them. But that "effect" does not reach back far enough to touch what the District does. If the plaintiffs feel the Constitution gives them an equal say in the control and use of other people's water, then they should sue the people who own the water to establish such a right. But that should not give them a right to take control of the owners' servant merely because it tends the ditch.

even have standing to object are identical to the activities of private electric utilities and private businesses.

These plaintiffs have never been able to say how their interest in lower electric rates differs from the interest of their neighbors who take their electricity from Arizona Public Service and pay about the same price for it. The same is true of nuclear issues or environmental issues. Whatever interest these Appellees have in wresting control over such issues from the Project's owners, it differs not one iota from the interest of Arizona Public Service ratepayers or of other participants in a market economy.

It is against the background of this struggle for control of the Salt River Project that the core constitutional question comes into focus. The State of Arizona has chosen to encourage private investment in water reclamation subsidized by proprietary power sales. The question is whether the State is constitutionally entitled to achieve that objective through an entity whose electoral scheme does not rigidly adhere to the one person, one vote standard. Rather, it provides for the selection of the governing board by a combination system, predominantly risk-based and partially customer oriented.

Unless the Constitution permits Arizona that much policy-making leeway, the State's underlying objective—profit-motivated water reclamation—is doomed to failure. If the only reward for successful risk-taking is customer control, the entrepeneur will make his investments elsewhere.

C. The Court of Appeals Based Its Holding Upon an Erroneous View of Arizona Law.

The Arizona Supreme Court has never had any doubt about the business nature of, and the proprietary rights in, the District under state law. That Court has held:

> The ultimate parties in interest in both the association and the district are the landowners within the

identical boundaries of the association and the district. *Reichenberger v. Salt River Project Agricultural Improvement and Power District*, 50 Ariz. 144, 151, 70 P.2d 452, 455 (1937).

The public does not own the District. . . . Instead the owners are the private landholders. The profits from the sale of electricity are used to defray the expense in irrigating these private lands for personal profit. The public interest is merely that of consumers of its product, for which they pay. . . . The District does not function to 'serve the whole people' but rather the District operates for the benefit of these 'inhabitants of the district' who are private owners. *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 44, 275 P.2d 393, 402-03 (1954).

Only last year in *Neidner v. Salt River Project Agricultural Improvement and Power District*, 121 Ariz. 331, 332, 590 P.2d 447, 448 (1979), the Arizona Supreme Court held:

The District's powers as a political subdivision are 'limited to the purposes justifying its political existence' and the provisions of Art. 13, § 7 do not alter the inherent characteristics of the District as 'a business corporation with attributes of sovereignty which are only incidental, conferred for the purposes of better enabling it to function and accomplish the business and economic purposes for which it was organized.'

These holdings by the Arizona Supreme Court as to the purposes, priorities, and powers of the District under state law are supposed to be binding on federal courts. *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 488 (1976). The Court of Appeals disregarded these controlling statements of Arizona legislative purpose and grounded its invalidation of the state statute in a very different understanding of the District's intended purposes, priorities, and powers:

The operation of the utility has taken on independent significance. In view of the magnitude of the electric utility operations and the large percentage of

> the water services which are used and paid for in a manner unrelated to land ownership, it would elevate form over substance to characterize the District as functioning solely for the benefit of landowners. (J.S. App. A-4, 613 F.2d at 184, emphasis supplied).

The Court of Appeals has therefore grounded its holding on its view of Arizona legislative purpose contrary to that of the Arizona Supreme Court as well as ¶34 of the Stipulated Facts.

There is no constitutional principle that gives customers a right to control a business merely because it is chartered and assisted by the state, even if it is denominated a political subdivision. *Salyer* necessarily holds that much. The Constitution gives such a right only when the entity has sufficient governmental effects, within the principles of *Salyer*, that control is necessary to preserve "other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

Where a special purpose subdivision has no significant effect upon people's civil and political rights but rather exists as an instrument of the legislature's economic policies, carrying on essentially business activities, the need for close judicial supervision of the legislature's policy choices correspondingly diminishes.

II.

UNDER THIS COURT'S PRECEDENTS, THE CONTROLLING CONSTITUTIONAL TEST FOCUSES ON THE NATURE OF THE DISTRICT'S FUNCTION RATHER THAN ITS SIZE, AND THE ARIZONA STATUTES SATISFY THAT TEST.

The Salt River Project Agricultural Improvement and Power District bears a municipal label. It is a special district—an agricultural improvement district.

The reason for the acquisition of political subdivision status was the benefit of tax free bonds. That benefit in no way harms these Appellees, and they do not complain of it. As discussed in the preceding section, those characteristics of the District of which the Appellees complain are indistinguishable from those of any investor-owned utility.

This Court has held that the permissibility of individualized electoral systems for the myriad of special purpose districts turns on the nature of their activities. Where the entity's effects on those who would have control of it are not of the kind to trigger constitutional protection, mere variation in the quantum of activity should not change the result.

In *Salyer Land Co. v. Tulare Lake Water Basin Storage District,* 410 U.S. 719 (1973), and *Associated Enterprises, Inc. v. Toltec Watershed Improvement District,* 410 U.S. 743 (1973), this Court held the strict judicial scrutiny test of *Reynolds v. Sims,* 377 U.S. 533 (1964), and other cases inapplicable where two conditions are present: (1) the governmental entity has a special limited purpose and (2) its activities have a disproportionate effect on landowners as a group.

Factually, there are two differences between this case and *Salyer:*

1. The Salt River Project is larger and serves a larger number of people.

2. This District sells electricity as a subsidy for its primary water storage and conservation activities.

There are also similarities. Though the District serves many customers, its functions are limited in scope. And the disproportionate effect on landowners as a group is undeniable. Since water entitlements are tied to land ownership, so also are the benefits of the Project's successful efforts. Likewise, the burdens of the District's activities, such as the bonded indebtedness liens and acreage assessments, are proportionate to land ownership. (Facts ¶ 43, J.A. 35)

The fundamental issue in this case is sharply presented, therefore, by the stipulated facts and by the Court of Appeals holding. The lower court held that a special district which may otherwise be within the *Salyer* principles falls outside it when it becomes big. *Salyer* turns on function rather than size, on what the District does rather than how big it is or how many customers it serves. Therefore, the judgment of the lower court must be reversed.

The governing constitutional standard should be anchored to function rather than size for three reasons: (1) the functional test is clearly supported by this Court's precedents; (2) public policy considerations favor the focus on function; and (3) a constitutional test that depends on how large the governmental entity is or how many customers it serves would be unworkable because of the impossibility of drawing a constitutionally meaningful dividing line.

Each of these considerations will be separately discussed.

A. Precedent.

Avery v. Midland County, 390 U.S. 474 (1968), first extended the *Reynolds v. Sims* strict judicial scrutiny of voter classifications to the elections of general purpose local governmental bodies. *Avery* held that the Texas County Commissioners' Courts must apportion their electoral districts by equal population. While the Court was willing to extend the doctrine to "units of local government having general governmental powers over the entire geographic area served by the body," it was careful to distinguish those circumstances from what it correctly anticipated might be the situation presented in a case like this one involving a "special purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents . . . ." 390 U.S. at 483.

In *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970), the requirement was applied to a malapportioned junior college district, because the trustees performed "important governmental functions

. . . ." 397 U.S. at 54. Again however, the Court was careful to reserve judgment in situations involving units "whose duties are . . . far removed from normal governmental activities and . . . disproportionately affect different groups." 397 U.S. at 56.

Three years after *Hadley*, the Court in *Salyer* squarely faced the issue reserved in *Avery*—applicability of the one person, one vote principle to special purpose units of government. *Salyer* upheld the voting system of a user-initiated California water storage district. Like Arizona's agricultural improvement districts, the California scheme restricts the vote to landowners, but, unlike Arizona, weights the vote according to assessed valuation of the owners' holdings. Also like Arizona agricultural improvement districts, the California water storage district's primary purpose is to develop, store, and deliver water to benefit agricultural lands. The California district also has a significant non-reclamation function—flood control. The principal purpose of the California water storage district was the "acquisition, appropriation, diversion, storage, conservation and distribution of water . . . ." 410 U.S. at 723. "Incidental to the general power," districts may perform other functions, including "the generation and distribution of hydroelectric power." 410 U.S. at 723-24. The cost of the works developed were assessed against district land in accordance with the benefits accruing to the land. This Court stated the rule that governs such districts:

> We conclude that the appellee water storage district, by reason of its special limited purpose and of the disproportionate effect of its activities on land owners as a group, is the sort of exception to the rule laid down in *Reynolds* which the quoted language from *Hadley, supra* and the decision in *Avery, supra* contemplated.
>
> The appellee district in this case, although vested with some typical governmental powers, has relatively limited authority. Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the

Tulare Lake Basin. 410 U.S. at 729.[12]

Decided the same day was a companion case, *Associated Enterprises, Inc. v. Toltec Watershed Improvement District, supra,* which upheld the organization election of a Wyoming watershed improvement district (Wyo. Stat. §§ 41-354.1 to 354.26 (Supp. 1975)), in which voting was restricted to landowners and a majority of voters and of acreage represented was required to carry a vote. The per curiam opinion stated:

> As in *Salyer, supra,* we hold that the State could rationally conclude that landowners are primarily burdened and benefited by the establishment and operation of watershed districts and that it may condition the vote accordingly. 410 U.S. at 745.[13]

The common feature—indeed the controlling feature—of this Court's holdings and rationale in *Avery, Hadley, Salyer* and *Associated Enterprises* is a recognition of the functional differences between general governmental units and special purpose entities. Elections for the governing bodies of governmental units whose powers cut across a substantial portion of the spectrum of governmental power, such as counties and cities, or whose powers are central to

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[12] In its only relevent decision since *Salyer* and *Associated Enterprises, Hill v. Stone,* 421 U.S. 289 (1975), this Court reaffirmed the exception of "special interest" districts from strict scrutiny review under the Equal Protection Clause. 421 U.S. at 295 n. 5.

[13] Significantly, the Court suggested another rationale (not specifically mentioned in *Salyer*) for upholding the constitutionality of such statutes. The Court pointed out that the Wyoming statute was enacted by a popularly-elected legislature and the special purpose district was created by a popularly-elected board of supervisors.

Similarly, the Arizona Legislature has closely overseen the agricultural improvement district enabling statutes. They have been amended 15 times since 1963. Those changes included such substantial matters as introducing fractional acreage voting, adding four at large directors elected on a one landowner, one vote basis, establishing electric ratemaking procedures, granting revenue bounding capability, requiring approval of such bonds by the Arizona Corporation Commission, and allowing payments in lieu of property taxes.

the operation of government, such as school districts, are subject to the same rule of strict judicial scrutiny as governs the election of state legislators. A different rule obtains, however, where the reach of authority is more limited. Where, as in *Salyer* and in this case, authority is limited to water conservation and related proprietary functions, the applicable rule is the one that permits a greater range of options to the State's policy makers.

Viewed functionally, the District in this case falls squarely within the *Salyer* test.

1. The District Has a Limited Purpose.

With respect to the limited purpose requirement, the Salyer opinion recognized that special districts may engage in several different functions. In *Salyer,* one of these functions was flood control. The Court's holding, however, focused on the district's primary purpose: "Its primary purpose, indeed the reason for its existence, is to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin." 410 U.S. at 728.

Salyer, therefore, stands for the principle that a system for selecting a special district's board may reflect a preference for the primary purpose for which the district was created, even though other possible purposes (in *Salyer,* flood control) are subordinated.

Neither in *Avery,* nor *Hadley,* nor *Salyer,* nor in any other case has this Court said that the relevant test turns on the volume of the business or number of persons affected. The relevant inquiry is an inquiry into function, and the Salt River Project's investor-initiated functions are highly limited.

Starting from the premise that some kinds of functions qualify for special district status, the safest and most obvious candidates must be the storage, conservation, and delivery of untreated water, and the supply of electricity. As to water, *Salyer* and *Associated Enterprises* are squarely on point. And in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), this Court stated that electric ser-

vice is not "traditionally associated with sovereignty." 419 U.S. at 353. Water and electricity represent the kinds of service that can be performed, and frequently are, by private enterprise. Each is a self-contained business, completely independent from services that are rendered only by government.

Moreover, in fact the Salt River Project is not engaged in two independent enterprises. The stipulated fact—the controlling fact—is that the sale of electricity was undertaken not for its own sake, but for the primary purpose of reducing the cost of water delivery.

In implicit recognition of the dispositive nature of this stipulation, the appellees have made consistent efforts to recant it. The most recent effort is an argument that, while paragraph 17 of the Facts identifies the primary water purpose of the Salt River Reclamation Project and the Salt River Valley Water Users Association, it does not refer to the District (Motion to Affirm, p. 3 n. 2). This effort to avoid the controlling stipulation on a technical distinction between the "Project" and the "District" is inadequate even from a technical standpoint. The paragraph of the Facts specifically stating the identical primary purpose of the "District" is paragraph 34:

> The District was organized for the purpose of continuing the operations of the Association, the principal objective of which was to provide water for use within the geographic boundaries of the Association and District .... The primary legislative purpose of the District is to provide water to District lands. (Facts ¶34, J.A. 31).

The whole thrust of the *Salyer* test is that the dividing line between the constitutional and the unconstitutional depends on function rather than size. Focusing on function, the District clearly meets the "limited special purpose" requirement of *Salyer*.

2. Disproportionate Effects.

The disproportionate effect of the activities of this District on the landowners it serves is also undeniable. The principal disproportionalities derive from the original entrepreneurial purposes and risks taken by the landowners. The assets necessary for the original creation of the Salt River Project were the lands within the Association boundaries and the landowners' money. Without the District's acreage voting, the Association's property and powers would never have been transferred to the District, and there would be no District.[14] The sole causal motivation for the District's activities, including the sale of electric power, is to make more effective and less costly the conservation and delivery of water to Association lands.

It is the landowners who ran the risk of the Project's creation, and the landowners who have directly benefited from it. And it is the landowners who run the risk that if the Court of Appeals' judgment becomes law, a new board of directors, elected entirely by a customer constituency, could lower electric rates to a point that an acreage assessment by the Association or an acreage tax by the District would have to be imposed. In that event, the owner of a $200,000 city house on a one-third acre lot would not pay the same tax as the owner of a $200,000 50-acre farm. The farm owner would pay exactly 150 times the taxes of the city dweller's property, and the owner of a one-section (640 acre) farm would pay 1,920 times as much. But under the Court of Appeals decision, all three would exercise the same voting power to set in motion events leading to such a tax or assessment.

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[14] As was stipulated in this case (Facts ¶ 33, J.A. 31), the Court found it reasonable to conclude in *Salyer* that the landowners would not have subjected their lands to the liens and assessments unless they retained a dominate voice in control of the district they created. 410 U.S. 719, 732.

It is difficult to conceive how any district could affect any group more disproportionately than the Salt River Project affects landowners. The Court of Appeals' holding to the contrary is based on nothing more than a confusion between disproportionate effect and size. The lower court asserted:

> The electric utility operations of the District are so substantial in scope and are so closely interwoven with the water delivery functions of the District that it is not a special limited purpose district whose operations have a disproportionate effect on landowners as a class. (J.S.App. A-9, 613 F.2d at 185).

Ironically, the disproportionate effect on landowners is the very reason that the appellees brought this lawsuit. Appellees would change the historic purpose of the District, which is to benefit the lands by providing low cost water on a dependable basis. The landowner venture begun at the turn of the century and augmented by continuing landowner risk since that time has proven successful. The risk worked. The assessed valuation of agricultural lands within the District and the Association is generally twice the assessed valuation of comparable agricultural lands outside the boundaries of the District and the Association. (Facts ¶55, 2 J.A. 39). All of this has been accomplished through electric rates comparable to those of the State's two largest privately owned electric utilities and an agricultural water subsidy that represents a return to its landowner-investors comparable to the dividends paid to common stockholders in comparable electric utilities. The risks that made the venture possible were proportionate to land ownership, and the benefits from the venture, water subsidies, are proportionate to land ownership. It is, of course, in the appellees' interest to change that arrangement by substituting a customer-controlled board of directors which would decrease the electric rates and also decrease the water subsidy. In that event, the disproportionate effect on landowners would in fact diminish.

Different cases have different facts. Allowing for those differences, the facts of this case are analogous in all material respects to the facts of *Salyer* which called into play the rational basis test. For the reasons discussed in this brief, particularly Section III below, the facts of this case clearly satisfy the rational basis test.

B. Public Policy.

In *Reynolds v. Sims* the Court cured the basic problems of voter inequality and the powerlessness of voters to express their majority will through the ballot. Extending *Reynolds v. Sims* to cities and counties posed more difficult theoretical problems, but it was defensible, because the governmental authority of those bodies sweeps across the entire spectrum of governmental services and in many ways affects people's lives in more important ways than any other governmental unit. However, elimination of the special/general governmental distinction—or making it turn on such undefined and undefinable criteria as the number of people who buy electricity—completely strips the constitutional test of its theoretical moorings.

Legislatures have created many special districts to implement fundamental policy choices rather than to allow local groups to make the fundamental policy choices. In this case, the specific policy choice is that essentially private water development should be encouraged by allowing risk-takers to subsidize their reclamation efforts by proprietary power sales. To deny the state the power to allow risk-based control systems for such undertakings is effectively to deny it the right to make that specific economic policy decision. *Reynolds v. Sims* now assures that the state legislature is best able to weigh the competing social interests at stake in any policy choice, including those entailed by the authorization of limited special purpose districts. Wise public policy militates in favor of leaving those substantive decisions to the legislature as long as that branch

strictly conforms to the democratic ideals of the one person, one vote principle. Judicial effort to make the fine-tuning adjustments at all levels of government would be bad constitutional law, bad federalism, and bad public policy.

D. Practicality.

Finally, the Court of Appeals' test is wholly unworkable. If the applicability of *Salyer* to a special district is to depend on its size or the number of customers, how large is too large, and how many customers is too many? The functional differences between general governmental units and special districts may not always be obvious, but at least they are rooted in principle and policy. They also have the benefit of existing precedent. Future cases, including this one, will build on that precedent and provide constitutional guidelines that are theoretically sound and practicably workable. The difference between the Texas County Commissioners' Courts in *Avery* or the school district in *Hadley* and an agricultural improvement district is understandable in theory and in practical application. In some instances, the distinction between general and limited entities may not be completely clear. But at least the distinction is anchored in firm constitutional theory which will provide a basis for case-by-case resolution, and for building up a body of consistent precedent. The difference between one quantum of electric customers and another provides no such basis.

Moreover, even if such a subjective standard were to be employed, it is difficult to see how the interests in this case are more severely affected than in *Salyer*. In 1975, the annual agricultural water subsidy amounted to an average of $8.89 per power customer. (Facts ¶84, J.A. 50). The central purpose of the Fourteenth Amendment is the protection of individual rights. How can an economic effect of $.74 a month amount to a constitutional violation, when in *Salyer* there was no violation? In *Salyer*, the district's refusal to sacrifice irrigation objectives for the sake of flood control caused Mr. Ellison to lose his job and left his home 15½ feet below the crest of a flood. 410 U.S. at 726, 738. If sheer

quantum of consequence upon the plaintiff is the measure of constitutional entitlement, then *Salyer* was a vastly stronger case than this one. But mere quantum is not the measure of "equal protection of the laws."

Precedent, policy and practicality all eschew the Court of Appeals test. The error must be corrected, and function rather than size continued as the controlling constitutional consideration.

III.

THIS COURT HAS CONSISTENTLY DEFERRED TO LEGISLATIVE CHOICES INVOLVING EITHER INNOVATIVE APPROACHES TO LOCAL GOVERNMENTAL PROBLEMS OR ECONOMIC POLICY DECISIONS.

Analysis of the two questions presented is aided by a principle common to both. It is a principle firmly established by this Court's precedents concerning the leeway that state legislatures enjoy in making policy choices, particularly with regard to local and economic problems.

There are two lines of cases.

A. Creativity and Experimentation in Local Government.

This Court has consistently recognized and encouraged creativity at the local governmental level in providing election schemes that depart from traditional governmental norms. In *Dusch v. Davis,* 387 U.S. 112 (1967), for example, the Court upheld the constitutionality of the City of Virginia Beach's "Seven-Four plan," under which four members of the eleven-person governing council were elected at large without regard to residence. The other seven were also elected at large, but each was required to reside within a designated one of the seven boroughs constituting the City of Virginia Beach. If the seven members required to live in a particular borough were considered as "representing" that borough, the population variations were extreme, ranging from Black Water, with a population of 730 people, to Bayside, with a population of 29,048. The Court nevertheless upheld the scheme, and observed as follows:

> The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside. 387 U.S. at 117.

In a companion case to *Dusch v. Davis, Sailors v. Board of Education,* 387 U.S. 105 (1967), the Court upheld a system under which county school boards were elected, not by county electors, but by delegates from local boards. The Court's opinion observed:

> Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. 387 U.S. at 110-111.

The lesson was repeated in *Avery v. Midland County:* "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." 390 U.S. at 485.

Most recently, the Court in *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60 (1978), emphasized "the extraordinarily wide latitude that states have in creating various types of political subdivisions and conferring authority upon them." 439 U.S. at 71. The opinion in that case also states:

> Government, observed Mr. Justice Johnson, 'is the science of experiment,' *Anderson v. Dunn,* 6 Wheat. 204, 226 (1821), and a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power. This Court has often recognized that political subdivisions such as cities and counties are created by the State 'as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.' *Id.* See also *Town of Lockport v. Citizens for Community Action,* 430 U.S. 259 (1977).

The appellees contend that the legislative changes in 1969 and 1976, both of which broadened the number of people entitled to vote in Salt River Project elections, erode the appellants' contentions because they represent a departure from a strict acreage representation scheme. These changes do not erode the appellants' position. They

strengthen it. They are in complete harmony with the signal emanating from decisions such as *Dusch, Sailors,* and *Holt Civic Club,* that this Court's apportionment and voter qualification rulings should not be read as inhibiting the traditional role of local and state governments as political laboratories, whose governmental experiments—both successes and failures—can prove valuable to the rest of the country. If the States of Michigan (*Sailors*) and Virginia (*Dusch*) can experiment with schemes whose effect is to give some weight to people's votes heavier than others in the election of the governing boards of school districts and cities, then Arizona must have some creative leeway also. Surely it has acted safely within that leeway by providing for a fourteen member agricultural improvement district board, ten of whom are elected from districts using acreage proportionate voting, four of whom are elected from districts in which each landowner's vote counts the same, and a President and Vice President elected at large on an acreage basis.

As Mr. Justice Harlan observed in a dissenting opinion in *Hadley,* joined by Chief Justice Burger and Mr. Justice Stewart: "The need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single-purpose local entity." 397 U.S. at 67.

The appellees' assertion that "the Salt River Project Agriculture Improvement and Power District is unique among local units of government in this country" may well be correct. (Motion to Affirm p. 16). The schemes that this Court approved in *Dusch v. Davis* and *Sailors v. Board of Education,* are also probably unique; our research has disclosed no counterpart to any of them. The clear message from those and other cases is that even where the governmental entity exercises general governmental powers (*Dusch* in-

volved a city and *Sailors* a school board), state legislatures enjoy a wide discretion in providing innovative methods for selecting the governing board where innovation represents a response to peculiar local problems.

The Constitution does not stifle experimentation. The fact that the Seven-Four Plan in *Dusch v. Davis* "seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside" was a factor that cut in favor of its constitutionality, and not against it. The same is true of the Salt River Project voting scheme, which probably is unique, as the appellees assert. It is the kind of uniqueness that this Court's decisions have not only approved, but encouraged.

B. Legislative Discretion in Economic Policy and Allocation of Resources.

There is a second reason that the Arizona Legislature should be given broad discretion to define the District's representational basis. While the Plaintiffs cast their suit in a procedural mold as a "voting rights" case, judicial alterations in the statutory basis for selecting members of the Board of Directors would really be just another way of changing the District's primary purpose. Indeed, that is the purpose of this lawsuit, just as it was in *Salyer*. The plaintiffs in *Salyer* wanted to remake the district to suit their desires by pursuing flood control at the expense of the irrigation objectives of the landowners who created the district. Both cases, therefore, presented the issue whether the selection of the primary purpose of governmental entities having limited functions should be determined by the legislature or by the courts. The *Salyer* judgment is obviously the correct one, because the choice among competing policy alteratives is essentially a legislative and not a judicial function.

Leaving the choice of primary purpose to the legislature rather than preempting it through constitutional adjudication is consistent with this Court's precedents in related areas. The net effect of the Arizona Legislature's acreage-based board representation is a subsidy for water conservation and use. Yet it is clear that without any constitutional impediment the Legislature could have provided such a subsidy directly. This Court has consistently held that Congress and the state legislatures enjoy a broad latitude in granting subsidies and otherwise allocating their scarce resources.[15] As observed in *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976), "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts'." Therefore, the identification of the primary purpose of the social security provision in *DeCastro* (providing certain benefits to the wife but not the divorced wife of a wage earner husband on the occasion of his retirement or disability) was upheld. This was so even though other objectives not selected by Congress were thereby thwarted and even though the effect of honoring Congress' primary objective was to treat wives and divorced wives unequally in ways vitally affecting divorced wives' financial subsistence. The Court's opinion states: "The old-age and disability insurance aspects of the Social Security system do not purport to be general public assistance laws that simply pay money to those who need it most. *That was not the predominant purpose* of these benefit provisions when they were enacted or when they were amended. Rather, *the primary objective* was to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age." 429 U.S. at 185-186 (emphasis added.)

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[15] *See Dandridge v. Williams*, 397 U.S. 471, 487 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Ohio Bureau of Employment Services v. Hodery*, 431 U.S. 471 (1977); *Mathews v. DeCastro*, 429 U.S. 181 (1976); *Alexander v. Fioto*, 430 U.S. 634 (1977); *Idaho Department of Employment v. Smith*, 434 U.S. 100 (1977); and *County Board of Arlington County v. Richards*, 434 U.S. 5 (1977).

Water is just as scarce a resource for the Arizona Legislature as social security dollars are for Congress. Indeed, of all Arizona resources, none is more scarce than water. There are few issues facing Arizona policy makers that are as important as how its water supplies are to be distributed among those interests that compete for them: residential development, mining, open space preservation, agriculture, industrial development, and others. Two realities necessarily undergird any decision. First, to whatever extent the State's water is used for one purpose, there will be less available for others. Second, where agricultural uses are favored, there are subtle but unmistakable impacts on other state policies, such as recharge of underground aquifers, encouragement of green belt areas, and disincentives to residential development.

The issue is broader than the allocation of scarce water resources among competing interests. The Salt River Project is engaged not only in water storage and delivery, but also conservation.[16] To the extent that these activities are successful, the total amount of available water is increased. And there is no question that the District's water conservation efforts have been successful. One of the largest issues before the Arizona Legislature over the past four years has been the allocation of the State's groundwater. (*See* Ariz. Rev. Stat. Ann. § 45-401 (Supp. 1980)). The problem has been much more severe in the Tucson area than the Phoenix area. The principal reason for the difference is the Salt River Project, which has provided the Phoenix area with a supply of surface waters, with correspondingly lesser demands on the underground supply.

This is not to say that there is direct evidence that in enacting the Agricultural Improvement District electoral statutes, Arizona legislators were directly motivated by environmental or water conservation considerations. The probable truth is that some were and some were not. The

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[16] The record discloses a broad range of water conservation activities. See Exhibits L, M, N, O, and P.

point is that in its selection of a method of voter representation for this specialized governmental entity, the Arizona legislature was necessarily dealing with a complex of sensitive and inter-related issues. Almost all of these issues are of economic policy, including allocation of the scarcest of its resources.

The optimum use of water or dollars presents the policy makers with the kinds of trade-off choices that lie at the heart of the legislative process. Both contexts involve the allocation of scarce resources and choices among difficult policy alternatives. In both contexts, the constitutional rule should be the same: "So long as its judgments are rational and not invidious, the legislature's efforts to tackle the problems of the poor and the needy [or here, water utilization in a water-scarce state] are not subject to a constitutional straight-jacket." *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972).

CONCLUSION

There is a limit to the range of policy choices that can and should be made by constitutional adjudication. This case provides the classic example.

Investor involvement in the Salt River Project began with creation of a private stock corporation with an acreage-based election procedure. A quarter of a century later, the Project acquired a governmental benefit and label.

Over the intervening four and a half decades, changes have been made. The appellees speculate that these changes were responsive to popular pressures. If so, the argument is strengthened that these are the kinds of matters that ought to be left to the political process—to legislative decision-making rather than judicial. Such is the thrust of this Court's decisions in many cases, and of its holding in *Salyer v. Tulare Lake Basin Water Storage District.*

Respectfully submitted,

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No. 79-1740

In The

Supreme Court of the United States

October Term, 1980

GERMAIN H. BALL, et al.,

Appellants,

v.

ROLAND W. JAMES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEES

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QUESTION PRESENTED

Whether a multi-purpose political subdivision which provides electric service to over one-quarter million customers and 60% of the municipal water supply for approximately 1.5 million people can condition and weight voting on property ownership.

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No. 79-1740

In The

Supreme Court of the United States

October Term, 1980

GERMAIN H. BALL, et al.,

Appellants,

v.

ROLAND W. JAMES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEES

STATEMENT OF THE CASE

This case concerns the constitutionality of the one acre, one vote election system of the pre-eminent political subdivision of the State of Arizona—the Salt River Project Agricultural Improvement and Power District (District or Salt River Project District). Although its pervasive electric utility operations and water management activities affect the lives of hundreds of thousands of residents in the Phoe-

nix metropolitan area,[1] the District is virtually unaccountable for its actions. As set forth more fully below, Appellants' brief significantly understates the District's wide-ranging activities and expansive growth.

A. *Although it was once Rural Farm Land, the District Today is Located in the Heart of Arizona's Most Populated Region.*

Established initially as the Salt River Valley Water Users' Association (Association) in 1903,[2] when Phoenix was little more than a dusty, desert crossroads, the original reclamation project evolved into much, much more. But despite the dramatic growth and urbanization in our community, and the corresponding change in the District's activities, the historic land-based voting scheme by which the District's governing board is chosen has remained relatively untouched.

The growth of the District's electric operations and the change in emphasis of its water activities, is, of course, directly related to the rapid urbanization of the District's geographic area. In 1937, when the District was formed, 94% of the the District's lands were agricultural. J.A. 46. By 1975, this proportion was reduced to 52%, with 48% of the District land committed to urban uses. *Id.* By 1979 ur-

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[1] Appellees are (1) residents of the District who are homeowners owning less than one acre of land and are entitled to a fractional vote for the District Board of Directors equal to the fraction of an acre which they own, ARIZ. REV. STAT. ANN. § 45-983.C (Supp. 1980) and (2) residents who own no land and are totally precluded from voting. ARIZ. REV. STAT. ANN. § 45-909 (Supp. 1980). Elections are held on the first Tuesday in April in even-numbered years. ARIZ. REV. STAT. ANN. § 45-965 (Supp. 1980).

This action was filed as a class action; Appellees have not appealed the denial of class action status by the Court of Appeals.

[2] For an excellent and thorough review of the District's history and growth, see Comment, *Voter Restrictions in Special Districts: A Case Study of the Salt River Project*, 1969 LAW AND THE SOCIAL ORDER 636 (now ARIZ. STATE L.J.). Although written before this Court's decision in *Sawyer*, the author argues forcefully that the District's voting system is constitutionally defective.

ban lands exceeded agricultural lands, making up 56% of the District. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SALT RIVER PROJECT 1979-80 ANNUAL REPORT 11-12 (1980) (1980 ANNUAL REPORT).[3]

Today the 236,000-acre area making up the District, J.A. 33, embraces much of the Phoenix metropolitan area, including major portions of Phoenix, Scottsdale, Tempe, Mesa, Glendale, Chandler, Peoria, Tolleson and Gilbert. J.A. 32. These cities make up almost 50% of Arizona's population. *See* Exhibit K at 6.[4] About 75% of the combined area of these cities is served by the District's electric operations. *Id.* at 8.

Although at one time there was virtually a direct relationship between the District's water and power activities and ownership of land, that nexus has been significantly eroded over time. This erosion has come about principally for two reasons. First, the thrust of the District's activities has shifted away from simply providing water for agricultural land toward providing water and power to the urban areas of metropolitan Phoenix. Second, and equally important, the costs and risks associated with District activities have likewise become largely unrelated to land ownership, because (1) 98% of the District's water and power revenues are supplied by its electric customers, J.A. 36, and (2) nearly 90% of the District's debt is currently secured by District electric revenues, not by liens on land. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, OFFICIAL STATEMENT FOR ELECTRIC SYSTEM REVENUE BONDS, 1980 SERIES B at 25 (Oct. 1, 1980) (OFFICIAL STATE-

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[3] Although the District's 1980 ANNUAL REPORT is not in the record, it is a public document of which this Court may take judicial notice. It is referred to only to indicate trends already established when this action was filed. A copy has been lodged with the Clerk.

[4] "Exhibit" refers to Exhibits to Stipulated Statement of Facts. The exhibits are not included in the Joint Appendix, but are contained in a separately bound volume included in the record on appeal.

MENT).[5] These changes, which resulted from the enormous demographic shifts within the District, have been facilitated practically every step of the way by the Arizona Legislature through amendments to the District's enabling act.[6]

B. *The Enormous Demographic Changes in the District Have Been Mirrored by Expansion and Change in the Nature of the District's Operations.*

Sixty years ago, the electric operations of the Association were truly incidental to its water delivery activities; it served only 21 customers. Exhibit K at A-5. By 1975, its successor, the Salt River Project Agricultural Improvement and Power District, whose election system is at issue here, served almost 250,000 electric customers. *Id.* at 6. By April, 1980, the District was serving 313,000 customers, OFFICIAL STATEMENT 21, and has become not only Arizona's second largest electric utility, but the seventh largest publicly-owned electric utility in the United States. AMERICAN PUBLIC POWER ASSOCIATION, THE PEOPLE'S RIGHT TO CHOOSE 15 (1978).

In 1955 the District was granted the exclusive right to provide electric service to significant portions of Phoenix and surrounding communities. J.A. 37. The rapid growth in these areas required the District to quickly expand its electric generating capacity. The District has broad authority to

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[5] See footnote 3, *supra*.

[6] See footnote 7, *infra* and pages 6-7.

go even outside the State of Arizona to secure virtually any source of energy.[7]

By the time of the filing of this action in 1975, the District owned four steam-generating plants and was a participant in the Four Corners Plant in New Mexico, the Navajo Plant in Page, Arizona, and the Mohave Plant in Nevada. Exhibit K at 8-11. In the intervening five years the District has acquired an ownership interest in the Hayden and Craig Plants in Colorado and the Coronado Generating Station in St. Johns, Arizona, and the Palo Verde Nuclear Plant now under construction west of Phoenix. OFFICIAL STATEMENT 8-10, 14. The District estimates that it must spend $1.9 billion during the next five years to expand its electric system in order to meet the demands of new growth within its service territory. *Id.* at ii.

C. *The District's Authority Over Water Allocation and Management have Little Relationship to Land Ownership.*

The District's water delivery operations are significantly unrelated to agricultural activities. The District delivers almost sixty percent of the municipal water used in Phoenix, Scottsdale, Tempe, Chandler, Peoria, Glendale, Mesa and Gilbert. J.A. 35. Water deliveries to these cities increased by 39% between 1974 and 1979. *Compare* J.A. 35 *with* 1980 ANNUAL REPORT 15. These water deliveries are paid for by the cities from municipal water revenues. J.A. 50.

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[7] For the purpose of acquiring or assuring a supply of electric power and energy to serve the district's customers, the board, for and in the name of the district may, without the boundaries of the state, acquire, develop, own, lease, purchase, construct, operate, equip, maintain, repair and replace, and contract for . . . any form of energy or energy resources including but not limited to coal, gas, oil shale, uranium and other nuclear materials, hot water, steam and other geothermal materials or minerals, solar energy, wind, water and water power and compressed air, . . .

ARIZ. REV. STAT. ANN. § 45-935.B. (Supp. 1980).

Appellants are far too modest in their description of the District's authority over water matters within the District's service area. A.B.[8] 11-12. The Arizona Legislature has vested the District with many special and significant powers over water allocation and management not only within, but also beyond, the District's geographic area. More important, such powers may be exercised whether the water is owned by District landowners or not. For example, the District has absolute veto power over all transfers of surface water from one place or type of use to another. ARIZ. REV. STAT. ANN. § 45-172 (Supp. 1980) This veto power extends not only to lands within the District, but also to any "watershed or drainage area which supplies or contributes water for the irrigation of lands within [the] . . . district . . . ." ARIZ. REV. STAT. ANN. § 45-172.5 (Supp. 1980).

Most important, Appellants' claim that the District "only stores water behind its dams" and "then delivers water . . . to the landowners who own it," A.B. 12, is flatly untrue. Arizona's recently enacted Groundwater Management Act,[9] ARIZ. REV. STAT. ANN. § 45-401 *et seq.* (Supp. 1980), sanctions a long-standing District policy of pumping and transporting as much groundwater as is needed within its geographic territory.[10] ARIZ. REV. STAT. ANN. §§ 45-494, 541.D (Supp. 1980). Because "[g]roundwater does not respect property ownership boundaries. . . . [the District is] withdrawing groundwater from a common source of supply." ARIZONA GROUNDWATER MANAGEMENT STUDY COMMISSION, FINAL REPORT I-5 (June, 1980). Thus, the District's groundwater pumping activities have a very real impact on the water supply of central Arizona bringing about conse-

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[8] "A.B." refers to Appellants' brief.

[9] For a comprehensive analysis of the new Act, see Pontius, *Groundwater Management in Arizona: A New Set of Rules*, 16 ARIZ. B.J. 28 (Oct. 1980).

[10] In 1974, for example, the District pumped 361,000 acre-feet of groundwater, Exhibit L at 20, roughly 30% of the water which it delivered.

quences which are important not only to landowners but to all residents of the District's geographic area.

D. *The Costs and Risks of the District's Activities are Unrelated to the Ownership of Land.*

Although many years ago there was a relationship between the District's activities and land ownership, that is no longer the case. As already discussed, the District's functions exceed the mere provision of services to landowners. Likewise, the costs and risks associated with District activities are unrelated to land ownership, because (1) 98% of the District's revenues are supplied by its electric customers, J.A. 36, and (2) only 12% of District debt is secured by a lien on the land within the District.

Although Appellants argue extensively about the risk undertaken by the landowners in financing District activities, A.B. 20-26, the only risk undertaken by the landowners is limited to the "pledging" of their land as security for the repayment of certain loans to the Federal Government and for the sale of District general obligation bonds. This, of course, does not constitute capital investment, qualifying the landowners as entrepreneurs. As of January 2, 1976, out of $796,687,583 in long-term debt, $12,353,345 was owed to the United States and $283,160,000 pertained to general obligation bonds. Exhibit K at 36. The balance of approximately $500,000,000 was made up of revenue bonds which are "secured by a pledge of and lien on all revenues and income" of the electric system. *Id.* at iii. The last general obligation bond sale was in 1972, one year after the Legislature gave the District power to sell revenue bonds. ARIZ. REV. STAT. ANN. § 45-1061 *et seq.* (Supp. 1980).

Because the District has financed its long-term debt *solely* through the sale of revenue bonds since 1972, it estimates that the general obligation bonds will be fully paid off by the year 2006. OFFICIAL STATEMENT 26. Significantly, the growth of revenue bond issuance has further diminished the importance of the landowners' "risk." By July, 1980,

out of $2 billion of long-term debt, only $240 million or 12%, was made up of general obligation bonds and United States Government obligations. OFFICIAL STATEMENT 25. Appendix A.

E. *The District's Acreage-Voting System Removes it from any Meaningful Public Accountability.*

Despite its significant and far-reaching activities, the District is essentially unaccountable for its actions. The acreage-based voting system has vested control of the District in the hands of a coterie of large farmers[11] in our predominately urban community. For example, in the 1974 election, 561 people voted 15,219.73 votes (acres). J.A. 32. One Board member, Thomas P. Hurley, who has served at least since 1970, owns 892.75 acres of land, Exhibit S; it would take over 3,500 owners of one-quarter acre lots to match his voting strength.

Because it is an agricultural improvement district, under the Arizona Constitution, the District is exempt from regulation by the Arizona Corporation Commission (Commission). ARIZ. CONST. art. 13, § 7; art. 15, § 2. Under Arizona law, privately-owned utilities, such as Arizona Public Service Co. and Tucson Electric Power Co. are extensively regulated by the Arizona Corporation Commission. ARIZ. CONST. art. 15; ARIZ. REV. STAT. ANN § 40-201 *et seq.*

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[11] When this action was filed, all District Board members were affiliated with farming enterprises and activities. Exhibit T.

Only token changes in the one acre, one vote system have ever been made by the Legislature. Fractional voting for those owning less than one acre of land, ARIZ. REV. STAT. ANN. § 45-983.C (Supp. 1980), has not given the "electorate" any where near the voting strength of the large landowners. *See* J.A. 32. The 1976 amendment, which added four new directors, elected at large, with property owners entitled to cast one vote, ARIZ. REV. STAT. ANN. § 45-965. D (Supp. 1980), has still left control of the District in the hands of large landowners.

(1956). The Commission must prescribe "just and reasonable" rates, ARIZ. CONST. art. 15, § 3, and is authorized to fully regulate all aspects of utility service. ARIZ. REV. STAT. ANN. § 40-321 (1956).

The Commission is composed of three Commissioners who are popularly elected. ARIZ. CONST. art. 15, § 1. Any person "directly and substantially affected by the proceedings" may intervene before the Commission. Ariz. Admin. Rul. and Reg. R14-3-105. Intervenors have full right to present testimony, obtain discovery and cross-examine witnesses. R14-3-103-109.

Parties dissatisfied with decisions of the Commission may obtain judicial review. ARIZ. REV. STAT. ANN. § 40-254 (1956). Thus, the activities of the private utilities are subject to scrutiny by an elected body and ultimately by the Arizona courts.

Unlike privately-owned utilities which are heavily regulated, the District has untrammeled authority to exercise its broad power and water functions absent any meaningful degree of public control. The rate-setting authority of the District is vested in its Board of Directors, ARIZ. REV. STAT. ANN. § 45-934 (1956), and it may make all decisions with respect to the terms of service. *See id.* There is no provision for intervention in District rate proceedings; the public may only make oral or written "presentations." ARIZ. REV. STAT. ANN. § 45-933.01.D.3 (Supp. 1980). Finally, there is no express statutory procedure for judicial review of District rate decisions.

Appellants' extended efforts to compare the District with a privately-owned utility, totally ignore these fundamental differences. Unlike the investor-owned utilities, there is virtually no public control over the District by any regulatory body.

SUMMARY OF ARGUMENT

Appellants erroneously contend that the Court of Appeals misapplied the principles established by this Court in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). Quite to the contrary, the Court of Appeals carefully applied the requirements of *Salyer*, and found that the Salt River Project District was not the narrow, limited-purpose district whose land-based voting system could be measured according to a rational basis test as in *Salyer*.

In *Salyer*, the Tulare Lake Basin Water Storage District (Tulare District) was carrying on water storage and delivery operations for a 193,000 acre agricultural area in which only 77 people resided. No electric power was produced or sold by the district. All costs of the water delivery operations were charged against landowners in proportion to services received. Over three-fourths of the land was owned by four corporations. This Court concluded that because (1) no public services were provided and (2) the district's actions disproportionately affected landowners as a group, a rational basis test would be applied in determining whether the land-based voting system was constitutional.

In contrast with the district in *Salyer*, the Salt River Project District not only provides electric service, but it serves more than 300,000 customers. Additionally, it delivers about 60% of the water used for municipal purposes in the Phoenix metropolitan area and possesses important additional powers over water allocation and management within and outside of its geographic area. Such activities clearly constitute important public services. *Salyer*, 410 U.S. at 728-29; *see Cipriano v. City of Houma*, 395 U.S. 701 (1969).

Also unlike the water storage district in *Salyer*, 98% of the costs of operation of the Salt River Project District are borne by electric customers. And, since 1973, the District has financed its capital improvements entirely from revenue bonds which are secured by District electric revenues.

Only 12% of District long-term debt is secured by a lien on the lands; further, the long-term debt has always been retired by District electric revenues. This Court has unequivocally held that a lien on land from municipal indebtedness is not sufficient to restrict the franchise to landowners. *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

The holding of the Ninth Circuit Court of Appeals in this case was entirely consistent with *Salyer*. Unlike the limited activity in *Salyer* of storing water and delivering it for agricultural use, here the economy and lifestyle of central Arizona are heavily affected by the activities of the Salt River Project District. Thus, the Court of Appeals correctly held that "in view of the broad scope and impact of its activities, the Salt River District cannot be characterized as having a special limited purpose." 613 F.2d at 183-84.

Also unlike the Tulare District which assessed all costs against landowners, here virtually all costs are recovered from District electric customers. The Court of Appeals correctly recognized that essential distinction. *Id.* at 184. Other federal courts and state courts have viewed *Salyer* in precisely the same manner as did the Court of Appeals.[12]

Thus, because *Salyer* presents an entirely different situation from the case herein, the strict standard of review enunciated in such cases as *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), and *Reynolds v. Sims*,

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[12] The most pertinent of these is *Choudhry v. Free*, 131 Cal. Rptr. 654, 552 P.2d 438 (1976), in which the California Supreme Court declared unconstitutional the acreage restrictions in the Imperial Irrigation District. The case is discussed in more detail at pages 24-26, *infra*. *See Baker v. Regional High School District No. 5*, 520 F.2d 799 (2d Cir. 1975) (*Salyer* would not apply to "general public services"); *Johnson v. Lewiston Orchards Irrigation District*, 99 Idaho 501, 584 P.2d 646 (1978) (district which received 66% of its revenue from domestic water sales substantially affected all residents); *Wright v. Town Board of Carlton*, 41 A.D.2d 290, 342 N.Y.S.2d 577 (1973) (district which supplied water for domestic use distinguished from *Salyer* because nonproperty owners were interested in availability of water supply).

377 U.S. 533 (1964), applies. Under this standard the inquiry is whether nonproperty owners are substantially affected by the District's activities. *City of Phoenix v. Kolodziejski, supra.* The essential electric and water operations of the District do have an important and substantial impact on all residents of the District. *Cipriano v. City of Houma, supra.*

Even if this Court was to apply the rational basis test, the acreage-voting system of the District is clearly irrational. The obligation to repay nearly all of the District's debt has nothing to do with land ownership; the debt is in the form of revenue bonds secured by a lien on electric power revenues for which the electric customers, not the landowners, are liable.

The acreage-voting procedure is purportedly designed to restrict participation in District affairs to those whose lands are encumbered by District debt and to those receiving water from the District, in proportion to the debt on their land and water delivered. J.A. 35; Exhibit Q. However, because only individually-owned lands may be voted, 40% of District land does not qualify for voting purposes in the elections. J.A. 31. Yet the lien on District lands also applies to the land which cannot be voted.

Further, voting is permitted regardless of whether the landowner does in fact use District water. If the claimed purpose of the one acre, one vote system is to connect voting strength to water use, the purpose is certainly not served when the voting system fails to take into account whether or not the voter actually uses District water.

The District claims that its voting system is an example of "creativity and experimentation in local government." A.B. 40. To the contrary, since the early 1900's, the land-based voting system has not been significantly modified by the Arizona Legislature to meet "changing urban conditions." *Sailors v. Board of Education,* 387 U.S. 105, 110-111 (1967). A "creative" response to what was a problem 70 years ago has become an unaccountable and inert political

structure exercising vast powers in the midst of a rapidly-changing urban community. Despite the expanded authority which the Legislature has given the District to meet the demands of new growth and the new power to issue revenue bonds, the Legislature has not conformed the District's voting system to reflect its new functions and powers. The "experiment" has lacked one essential ingredient—a system of governance which provides for public accountability.

The District has evolved from an organization established to satisfy the needs of an agricultural community into a substantial governmental unit providing essential electric and water services to a major metropolitan area. That transformation must finally be recognized in its electoral process. It is an anachronism to vest the control of such an important public institution to those representing solely agricultural interests. All segments of the community are vitally interested in the decisions and actions of the District; all must be allowed greater participation in the election process.[13]

[13] The Arizona Legislature would have the initial opportunity to devise a constitutionally-adequate voting system. Appellees do not believe that it is up to this Court, or the district court on remand, to fashion a constitutional voting scheme. All Appellees ask is a reasoned determination that the present system is unconstitutional. Upon such a determination, the State of Arizona may engage in meaningful "experimentation in local government" by devising a system which makes the District accountable to those it governs and serves.

ARGUMENT

I. THE DISTRICT'S ONE ACRE, ONE VOTE SYSTEM IS NOT WITHIN THE NARROW EXCEPTION TO TRADITIONAL CONSTITUTIONAL PRINCIPLES.

A. *This Court Has Looked with Disfavor upon Conditioning the Right to Vote on Property Ownership.*

It is elemental that the right to vote is considered one of the most sacred and important rights in our society. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). This Court has stated:

> [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, [and] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 562 (1964). A careful examination of voting requirements, other than reasonable citizenship, age, and residency, becomes necessary because of the potential danger of denying some citizens an effective say in "governmental affairs which substantially affect their lives." *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 627 (1969).

In a long series of decisions, this Court has firmly established that conditioning participation in the election process upon ownership of property is constitutionally impermissible. In *Kramer v. Union Free School District No. 15,* the Court invalidated the New York law which limited voting in school district elections to owners or lessees of taxable real property or parents of children enrolled in local public schools. The statute was challenged by a bachelor who neither owned nor leased taxable real property. The Court never reached the issue of whether the exclusions

were necessary to promote a compelling state interest because it found that the classification of "primarily interested" voters, even if permissible, was not drawn with sufficient precision to achieve the articulated state goal.

In *Cipriano v. City of Houma*, 395 U.S. 701 (1969), this Court invalidated a Louisiana law which gave only property taxpayers the right to vote in elections to approve the issuance of revenue bonds by a municipal utility. The Court found that the operation of the city's utility services affected virtually every resident. 395 U.S. at 705. The impact of the revenue bond issue was found to be unconnected to one's status as a property taxpayer because any "benefits and burdens of the bond issue fall indiscriminately on property owner and nonproperty owner alike." *Id.* Applying the "exacting standard of precision," enunciated in *Kramer*, the Court found that the challenged statute excluded "otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as those who are permitted to vote." 395 U.S. at 706.

In *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970), the Court struck down an Arizona constitutional provision which limited voting to real property taxpayers in elections authorizing the issuance of general obligation bonds. The City of Phoenix claimed that only property taxpayers could vote because under Arizona law property taxes were to be levied to service the bonds. The bonds were, in effect, a lien on the real property; if other revenue sources were insufficient to make debt service payments, property taxes would be used.

This Court carefully examined the interests of the nonproperty owners. First, they had a substantial interest in public facilities and services; second, revenues other than property taxes were used to satisfy more than half the debt service; and third, although the initial incidence of cost was on the landowning taxpayer, the ultimate burden was passed on to lessees of rental property in the form of higher rents. Property taxes paid by business were borne by all

residents alike in the form of higher products and service costs. The Court concluded that the "differences" between their interests were not "sufficiently substantial to justify excluding the latter [nonproperty owners] from the franchise." 399 U.S. at 209.

This Court has also held that voting could not be restricted to property owners in a special election in a road district to authorize the sale of bonds to build roads. *Police Jury of the Parish of Vermilion v. Hebert*, 404 U.S. 807 (1971), *rev'g mem.*, 258 La. 41, 245 So. 2d 349 (1971).

In *Hill v. Stone*, 421 U.S. 289 (1975), the Texas law limiting the right to vote in city bond elections to persons owning taxable property was declared unconstitutional. The Court summarized the relevant law as follows:

> The basic principle . . . is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or state can demonstrate that the classification serves a compelling state interest.

Id. at 297 (citations omitted). As in the *City of Phoenix* case, the Court concluded that although the initial cost burden of the bonds would fall entirely on property taxpayers, all members of the community, property owners and nonproperty owners alike, ultimately share in the costs.

B. *The District is not a Special-Purpose Unit of Government as Described in Salyer.*

1. The Tulare District and the Salt River Project District are Totally Dissimilar.

In *Salyer*, this Court was presented with the Tulare District whose sole function was to plan and execute projects for the acquisition, storage and distribution of water for agriculture. In contrast, the Salt River Project District has independent authority to provide electric utility service and water management and delivery responsibilities for a large urban area. Eighty-five percent of the land in the Tulare District was owned by four corporations. In contrast, there

are over 359,000 property owners in the Salt River Project District. J.A. 47. And of the only 77 people who resided in the Tulare District, 66 were employed by one farm; 11 lived in the remaining 165,000 acres. Transcript of oral argument in *Salyer* at 36. In contrast, the Salt River Project District includes the major portions of the Phoenix metropolitan area. J.A. 32.

Costs of the Tulare District's projects were assessed against land strictly in accordance with the benefits received by each parcel. In contrast, 98 percent of the Salt River Project District's revenues are derived from electric customers without regard to land ownership. J.A. 36. In the Tulare District, projects required the approval of a majority of the votes cast, and also a majority of the voters. *Salyer*, 410 U.S. at 723 n.3. In contrast, no such safeguard exists to protect all of the voters within the District. And "[u]nder Arizona Law, the District Board has exclusive authority to establish electric rates." Exhibit K at 30.

The Salt River Project District's powers are far more extensive than the Tulare District. The Arizona Constitution and statutes place the District on a par with municipalities:

> [A]gricultural improvement, . . districts, . . shall be political subdivisions of the State, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subsidivisions under this Constitution or any law of the State or of the United States; . . .

ARIZ. CONST. art. 13, § 7.

> An agricultural improvement district . . . is a public, political, taxing subdivision of the state, and a municipal corporation to the extent of the powers and privileges conferred by this chapter or granted generally to municipal corporations by the constitution and statutes of the state, including immunity of its property and bonds from taxation.

ARIZ. REV. STAT. ANN. § 45-902 (1956). As incidents to its city-like status, the District may bring condemnation proceedings and exercise the right of eminent domain, ARIZ. REV. STAT. ANN. § 45-939 (1956), enter upon any land to carry out its purposes, ARIZ. REV. STAT. ANN. § 45-940 (1956), and raise revenue through the levy of taxes, ARIZ. REV. STAT. ANN. § 45-1011 *et seq.* (1956). Most important, the District Board of Directors, appellants herein, has plenary and exclusive power to direct District operations and affairs. ARIZ. REV. STAT. ANN. §§ 45-935-937 (1956) (Supp. 1980).

Unlike the Tulare District which had no other function than to store and distribute water for farming, the Salt River Project District has broad authority to engage in electric power operations totally independent of its water delivery activities. Under Arizona law, the District may, without regard to reclamation activities, "provide power . . . for the use of the owners or occupants of the lands." ARIZ. REV. STAT. ANN. § 45-903.6 (1956). The District's Board of Directors is further authorized to execute contracts "[f]or providing or furnishing power . . . for use of the owners or occupants of land within the district." ARIZ. REV. STAT. ANN. § 45-936. A. 3. (1956).[14]

The foregoing statutes dispel the District's argument that its vast electric operations are nothing more than a business venture of the landowners. Indeed, the Court of Appeals correctly dismissed that contention:

> [T]he scale of the District's operations simply does not permit the interpretation that the electric utility is a side venture that the District dabbles in to pick up a

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[14] Appellants dwell at length on the parties' stipulation that the creation of the District in 1937 was to carry out the original reclamation activities of its predecessor, the Water Users' Association. Of course, at that time, the power activities of the Association and the District were truly incidental to water delivery.

Even the District impliedly acknowledges its changed character and emphasis. It has stated that "[t]he *initial* reason for the existence of the Salt River Project was water supply." Exhibit K at 7 (emphasis added).

> little extra money in order to benefit the landowners. The operation of the utility has taken on independent significance. . . . [I]t would elevate form over substance to characterize the District as functioning solely for the benefit of landowners.[15]

613 F.2d at 184. Thus, the District's electric operations have an independent existence fully separate and distinct from its water activities.

Even the District's water functions are totally dissimilar to the narrow agricultural purpose of the district in *Salyer*. Although the District's functions were once limited to supplying water for farming, the mushrooming growth in the Phoenix area affected the use to which District water was put. When this action was filed, 40% of District water was used for urban purposes. J.A. 48. The Court of Appeals correctly observed that this water is "used and paid for in a manner unrelated to agriculture or land ownership." 613 F.2d at 184. The eight cities, which receive almost 60 percent of their municipal water from the District, J.A. 35, pay for the water from municipal water revenues. J.A. 50. Although the quantity of water delivered to the cities is based

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[15] The only power activities of the District which are incidental to its water functions are its hydro-electric generating facilities located at its dams. Exhibit K at 8.

Referring to the reclamation project, which exists separate and apart from the District, J.A. 20, the 1949 contract between the District and the Water Users' Association provides that "[i]t is recognized that the Salt River Project is primarily an irrigation project, and that *development and generation of hydro-electric power therein is secondary*," . . . Exhibit H at § VII (a) (emphasis added).

The reclamation statutes citied by Appellants contain no authority for the District to engage in the generation and sale of electricity wholly independent of reclamation activities. *See* 43 U.S.C. §§ 501, 522, 598. Furthermore, in an opinion to an Arizona legislator, the Office of the Solicitor, Department of the Interior, states that any "authority of the District to build and operate thermal electric generating plants derives from state law, not from Federal law." Attached as Appendix A to the Reply Brief filed in the Court of Appeals.

upon acreage,[16] the water is used in ways unrelated to land ownership.

Appellants argue that the "use to which this water is put once it is delivered to its owners is of no concern to the District. . . ." A.B. 14. Despite this cavalier attitude, the fact remains that the District controls the primary water supply system for almost one and one half million people. The use of District water for municipal purposes is markedly different from the agricultural use of water in *Salyer*.

The District's management of the 13,000 square mile watershed which ultimately serves the Phoenix area has taken on even greater significance in light of the recognized long-term water shortages which face our community. The Arizona Legislature recently enacted a comprehensive groundwater code, noting:

> The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens.

ARIZ. REV. STAT. ANN. § 45-401.A. (Supp. 1980). The Salt River Project District is located within an area designated as requiring the active management of groundwater. ARIZ. REV. STAT. ANN. § 45-411.A.2 (Supp. 1980). Preserving Arizona's diminishing reserves of groundwater transcends the interests of property owners alone.

In summary, the District's tandem electric and water activities are functionally different from the district in *Salyer*. The District is not serving the water needs of an agricultural area far removed from city life. To the con-

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[16] The cities accept delivery of water in amounts based upon land which they own and urban land no longer receiving irrigation from the District. J.A. 34.

trary, it is literally the "life support" system for the 13th largest city in the United States.

2. The District Provides General Public Services.

In finding that the water storage district in *Salyer* did not exercise what would be considered "normal governmental authority," this Court stated:

> It provides no other general public services such as schools, housing, transportation, *utilities*, roads, or anything else of the type ordinarily financed by a municipal body. App. 86. There are no towns, shops, hospitals or other facilities, designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses or trains. Ibid.

410 U.S. at 728-29 (emphasis added). The District does provide utility service; towns, shops and hospitals are located within its boundaries.

Appellants argue that "[w]ater and electricity represent the kinds of service that can be performed, and frequently are, by private enterprise." A.B. 34. Yet the Court specifically mentioned utilities as an example of a general public service which would be outside the rule established in *Salyer*. The cases preceding *Salyer* establish that this Court is concerned with the manner in which government affects people's lives rather than the label attached to the activity. *Avery v. Midland County*, 390 U.S. 474, 484 (1968) ([T]he powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens, ..."); *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 54 (1970) ("[T]hese powers ... have sufficient impact throughout the district to justify the conclusion that the principle which we applied in Avery should also be applied here.").

The most compelling legal authority directly contrary to Appellants' position is this Court's decision in *Cipriano v. City of Houma, supra.* There the Court struck down property ownership restrictions in elections called to approve bond sales to finance extensions and improvements to the city's gas, water and electric system. Thus, it must be concluded that because the District provides vital public services it is outside of the narrow holding of *Salyer.*

3. The District's Activities do not Disproportionately Affect Landowners.

The Court in *Salyer* carefully explained that *all* costs of the Tulare District's activities were borne by landowners.

> All of the costs of district projects are assessed against land by assessors in proportion to the benefits received. Likewise, charges for services rendered are collectible from persons receiving their benefit in proportion to the services. . . . *In short, there is no way that the economic burdens of district operations can fall on residents qua residents,* and the operations of the districts primarily affect the land within their boundaries.

410 U.S. at 729 (emphasis added). Salt River Project District operations are easily contrasted with *Salyer.* Virtually all of the costs of the District's water and power operations, 98%, J.A. 36, are paid by electric customers, without regard to land ownership.

The District's water operations are only partially related to land ownership because 40% of District water is used for urban purposes. J.A. 48. It makes little practical difference that water is delivered first to municipalities which in turn distribute the water to consumers because "the charges set by the district obviously affect the rates set by the municipalities . . . ." *Choudhry v. Free,* 131 Cal. Rptr. 654, 552 P.2d 438, 441 n.6 (1976).

This Court has already acknowledged that the operation of water and electrical systems serving an urban community affect more than just property owners.

> Of course, the operation of the utility systems—gas, water, and electric—affects virtually every resident of the city, nonproperty owners as well as property owners. All users pay utility bills, and the rates may be affected substantially by the amount of revenue bonds outstanding. Certainly property owners are not alone in feeling the impact of bad utility service or high rates, or in reaping the benefits of good service and low rates.

Cipriano v. City of Houma, 395 U.S. at 705.

Throughout their brief, Appellants argue that the one acre, one vote system was designed to shield their "entrepreneurial risk" and their "investment." A.B. 20-28. But the District's balance sheet is devoid of any "equity." Exhibit L at 15. The landowners have invested none of their own money in District operations. Their "risk" is limited to the lien on District lands arising from the general obligation bonds and loans owed to the United States Government.

As of January 2, 1976, the District's total outstanding long-term debt was $796 million. Exhibit K at 36. Of that amount, only 36% of the long-term debt was made up of general obligation bonds which are considered a lien upon property in the District. ARIZ. REV. STAT. ANN. § 45-1047 (1956). By July 31, 1980, out of $2 billion in long-term debt, general obligation bonds (and United States Government obligations) were only $240 million or 12% of total indebtedness. OFFICIAL STATEMENT 25. All general obligation bonds will be fully paid off in 26 years. *Id.* at 26.

There is very little risk that the District would ever have to levy against these lands to pay off its general obligation bond debt. "In all years to date net electric revenues have

been more than sufficient to meet all debt service requirements." Exhibit L at 18.[17]

Thus, the claimed "entrepreneurial risk" is illusory. Despite the repeated rhetoric attributing to landowners a significant financial stake in District activities, it can easily be seen that such is certainly not the case. The active financing of long term debt through the sale of revenue bonds has made the landowners' risk virtually nonexistent.

C. *The California Supreme Court, Considering Facts very Similar to Those Present Here, Rejected Property-Ownership Restrictions.*

The singular agricultural purpose of the Tulare District, its remote location away from urban areas, and its sole impact on landowners, was recently analyzed by the California Supreme Court, under both state and federal law,

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[17] Appellants express the fear that a new board of directors more representative of the public at large "could lower electric rates to a point that an acreage assessment . . . or an acreage tax . . . would have to be imposed." A.B. 35. They complain that the owner of a 50 acre farm would pay much more than a homeowner. This speculation is unfounded for a number of reasons.

First, the general obligation bonds all contain covenants binding the District to collect electric rates "sufficient at all times to pay all necessary costs of the operation and maintenance of said electric system" and "to pay the principal of and interest on all bonds of said District. . . ." Resolution authorizing sale of $180,000,000 of General Obligation Bonds at 27 (Feb. 10, 1970), attached as an Exhibit to Appellees' Response to Petition for Rehearing before the Court of Appeals. These covenants are, of course, binding on any future Board of Directors. *See City of Cleveland v. Cleveland City Ry. Co.*, 194 U.S. 517 (1904).

Second, there are obviously hundreds of thousands of homeowners who would presumably make up any new voting constituency; what possible interest would they have in encouraging any new Board to set rates so low as to jeopardize their land? The spectre of an acreage assessment could be more ominous to a homeowner than to the farmer. *See Stewart v. Parish School Board of the Parish of St. Charles*, 310 F. Supp. 1172, 1179 (E. D. La. 1970), *aff'd mem.*, 400 U.S. 884 (1970).

Finally, even if there were any merit to Appellants' concern, this Court has always held that it is impermissible to exclude voters from the franchise because of the way they may vote. *Evans v. Cornman*, 398 U.S. 419, 423 (1970); *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

when it declared unconstitutional the acreage restrictions for serving on the board of the Imperial Irrigation District, in a case remarkably similar to this.[18] *Choudhry v. Free, supra.* Although there was no freeholder requirement for voting, members of the board of directors were required to own property.

The court distinguished the Imperial Irrigation District from the Tulare District in precisely the same manner that the Ninth Circuit Court of Appeals concluded that Salt River Project District is different:

1. The district "may produce or purchase electric power . . . without regard to whether such functions are ancillary to irrigation . . . ."

552 P.2d at 443;

2. "[A]ssessments against land are not the sole means by which the district's expenses are paid. The district may collect charges for the sale of domestic water, electric power, . . and such charges are paid by both landowners and those who do not own land. And it is authorized to pay its bonds from revenues other than assessments."

Id.;

3. "[T]here is a very great difference between the actual functions and effects of the water storage district involved in *Salyer* and the district in the present case."

Id.

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[18] The California Supreme Court held the acreage restrictions unconstitutional even though the original legislative purpose of such districts was water delivery. Cal. Water Code § 20500 *et seq.* (1956). In fact, under California law "an irrigation district's main purpose is to develop, preserve and conserve water. . . ." *City of Modesto v. Modesto Irrigation District*, 34 Cal. App. 3d 504, 110 Cal. Rptr. 111, 113 (1973). Furthermore, just like the Arizona cases ascribing business-like characteristics to the Salt River Project District, the electric operations of California irrigation districts have been described as proprietary functions. *Yolo v. Modesto Irrigation District*, 216 Cal. 274, 13 P.2d 908, 910 (1932).

Upon finding these distinctions between the Imperial District and the district in *Salyer* and upon considering the impact of Imperial's activities on the lives of local residents, the court held the freeholder requirement unconstitutional.[19]

> *Since the directors of the district decide such issues as rate increases for water and power,* the distribution of water between agricultural and nonagricultural uses, *and other matters which could vitally affect the economic welfare of the residents as well as the environment in which they live, the bar of section 21100 imposes a substantial burden upon the right of franchise.*

Id. at 441 (emphasis added). The California Supreme Court opinion is a well-reasoned and careful application of this Court's holding in *Salyer.* It offers important guidance for this case because the facts forming the basis of the *Choudhry* opinion are quite similar to the facts here.

D. *The One Acre, One Vote System Fails to Meet the Strict Standard of Review.*

Because the Salt River Project District is not within the narrow exception to traditional voting analysis set forth in *Salyer,* its one acre, one vote system must be tested against the strict standard of review called for in *City of Phoenix v. Kolodziejski, supra.* Under this standard, the Court should consider whether nonproperty owners are substantially affected by the District's activities. *Kramer v. Union Free*

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[19] If a voter who does not own property cannot constitutionally be excluded from voting on a bond issue for the construction of a library (*Hill*) or bonds to be used by a municipal utility district (*Cipriano*) a fortiori, he may not be deprived of the right to vote in an election for director of an irrigation district, which exercises the broad powers and provides the essential services rendered by Imperial.
552 P.2d at 443.

School District No. 15, supra. It is clear that the interests of nonproperty owners and the interests of property owners are not sufficiently substantial to justify excluding the former from the franchise.

The lien on District lands is similar to the financial interest of property taxpayers asserted in *City of Phoenix.* City of Phoenix general obligation bonds are secured by the general taxing power of the City. 399 U.S. at 208. And property tax payments are relied upon to make debt service payments if other revenue sources are insufficient. *Id.*

The Court concluded, however, that the interests of nonproperty owners in the bond elections were not substantially different from the interests of property owners. Justice White, writing for the majority, stated:

> [I]t is unquestioned that all residents of Phoenix, property owners and nonproperty owners alike, have a substantial interest in the public facilities and the services available in the city and will be substantially affected by the ultimate outcome of the bond election at issue in this case.

Id. at 209. Likewise, all citizens are vitally interested in the District elections because Appellants have exclusive authority to make decisions regarding the District's essential water and power functions.

In *City of Phoenix,* half of the debt service was to be satisfied from revenues other than property taxes. *Id.* at 209-210. The interest of landowners here is even more remote because District debt service is financed solely through electric rates. Exhibit L at 18.

The obvious interest which all citizens have in a reliable supply of electricity and water has been expressly recognized by this Court. *Cipriano v. City of Houma, supra.* All citizens, whether they purchase electric service from the District or not, are affected by its electrical operations be-

cause they undoubtedly purchase services and products from others who do buy power from the District. Even in those District areas served by Arizona Public Service Co., the District sells A.P.S. its power requirements. J.A. 37.

The claimed financial interest of District landowners was conclusively rejected by the Court in *Hill v. Stone, supra.* Justice Marshall wrote: "Even under a system in which the responsibility of retiring the bonded indebtedness falls directly on property taxpayers, all members of the community share the cost in various ways." 421 U.S. at 299. It is not enough for the District to show that property owners are affected by its actions; it must also be shown that nonproperty owners are substantially less interested in District elections. The District is simply unable to establish this lesser interest.

II. THE ONE ACRE, ONE VOTE SYSTEM DOES NOT EVEN MEET THE TEST OF REASONABLENESS.

The purported purpose of the acreage-voting system is to (1) permit voting on a "debt-proportionate" basis and (2) to connect voting strength to water use. J.A. 35. Even under the more lenient rational basis test, the one acre, one vote system is unconstitutional. As the Court held recently, even in special-district elections, the "classification of voters into 'interested' and 'non-interested' groups must still be reasonably precise, . . ." *Lockport v. Citizens for Community Action,* 430 U.S. 259, 266 (1977).

The District's voting system is predicated upon the so-called "debt-proportionate" system. Debt-proportionate voting was explained by the District in a March 18, 1969, Resolution. "[T]he privilege of voting is commensurate with the burden of debt; that is, the more land a person owns and puts forth as collateral, the more he has at stake, and the greater influence he has in Project affairs." Exhibit Q at 3.

The dramatic reduction in recent years in the amount of District debt secured by a pledge of lands within the District has completely destroyed the rationality of limiting the franchise on the basis of acreage owned. District landowners now run a technical risk of being forced to repay only about 12% of the District's total indebtedness;[20] District electric customers are totally responsible for about 90% of the District's debt, to be paid through power revenues. Yet the District still clings to debt-proportionate voting.

The privilege of voting to elect the governing officers of this District is no longer commensurate with the burden of debt. More than anything else, this fundamental shift in the way the District is financing its activities totally undercuts the rationale for limiting the franchise to landowners on the basis of acreage owned. Large landowners can, without any regulatory or governmental scrutiny whatsoever, saddle current and future customers with total responsibility to repay debts incurred to finance District operations. These customers have absolutely no voice in the decision to undertake this debt, except to the extent they own large amounts of acreage in the District.

The voting system does not even achieve the purported goal of authorizing voting commensurate with debt because all landowners cannot participate in District elections in proportion to land owned. Only about 141,000 acres or 60% of District lands are owned by persons otherwise qualified to vote and are thus eligible to be voted in the elections. ARIZ. REV. STAT. ANN. § 45-909 (Supp. 1980); J.A. 31. Because the lien on District lands burdens corporate landowners and not simply individual landowners, the goal

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[20] General obligations bonds contain covenants providing that electric rates must be set at levels sufficient to pay *all* debt service. See footnote 17, *supra*.

of allowing those to vote in proportion to the debt on their land is clearly frustrated by restricting voting to only landowners who are also qualified electors.

In *Salyer, all* landowners, both corporate and individual, were extended the franchise in elections for the water storage district: *"The franchise is extended to landowners* whether they reside in the district or out of it, and indeed *whether or not they are natural persons who would be entitled to vote in a more traditional political election."* 410 U.S. at 730 (emphasis added). This point was also considered by the court in *Stewart v. Parish School Board of the Parish of St. Charles, supra.* This was an action to invalidate a school bond election on the grounds that a Louisiana statute unconstitutionally limited voting in the election to qualified electors who were also property owners. The district court succinctly stated the inconsistency in the argument that restricting voting to *qualified electors* who owned property was designed to protect the interests of property taxpayers:

> But if protection of the property taxpayer had been the legislature's chief interest, the law would not have excluded business entities. These are the taxpayers who pay the largest share of taxes in most voting districts.

310 F. Supp. at 1178. Thus, the exclusion of business entities from the District's voting scheme demonstrates conclusively that the debt-proportionate voting system does not achieve its purpose of allowing voting commensurate with land ownership.

The acreage-voting system also bears little relation to the water delivery functions of the District because Appellants permit voting regardless of whether the voter actually uses District water. In other words, the owner of a commercial acre of land has the same vote as the owner of an agricul-

tural acre. If a purported basis of the voting system is to connect voting to water use, it is irrational to permit voting without any inquiry whatsoever into whether or not the voter does in fact use District water.

III. THE ASSERTED BUSINESS CHARACTERISTICS OF THE DISTRICT ARE NOT CONSTITUTIONALLY RELEVANT. THE VOTING SYSTEM MUST BE CONSIDERED IN LIGHT OF ITS IMPACT ON PEOPLE'S LIVES TODAY, NOT ITS HISTORIC PURPOSES.

A. *Regardless of its Asserted Business Character, the District's Voting System is not Immune from Constitutional Scrutiny.*

Implicit in Appellants' brief is the suggestion that the District is so like a business that even the reasonableness standard used in *Salyer* has no applicability to it. But even in *Salyer*, where the business attributes of the Tulare District were so apparent, the Court did not throw the Constitution out the window.

The Court of Appeals summed up this important point this way:

> *Salyer* did not hold that the fourteenth amendment did not apply to the water district. The Court assumed there was state action and dealt with the question of the requirements of the fourteenth amendment in that situation. The issue is not whether the Salt River District is a state entity, but whether, having made the decision to create the entity and provide for the election of its directors, the state can deny the electoral franchise to citizens whose economic interest and natural environment are vitally affected by the entity's operations.

613 F.2d at 184-85. Appellants do not even purport to defend the "reasonableness" of the acreage-voting scheme.

The historic purpose and categorization of the District by Arizona Courts are not and cannot be disputed. But what Appellants overlook is that the "Constitution is concerned with the practical consequences, not the formal categorizations, of state law." *North Carolina v. Alford,* 400 U.S. 25, 37 (1970).

The fallacy of Appellants' position is that constitutional guarantees may not be abridged merely because a "business" label is attached to governmental action; instead, the Court examines the manner in which government affects people's lives:

> [T]he Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.

Gomillion v. Lightfoot, 364 U.S. 339, 344-45 (1960). The prerogative of the federal courts to review the constitutionality of voting schemes purporting to protect the interest of special segments of society is implicit in *Salyer.*[21]

Appellants' argument that the economic subsidy to landowners resulting from the acreage-voting system is within the realm of legislative discretion, totally misses the mark. Of course, *popularly elected* governmental bodies should be free to make economic and social policy (within constitutional bounds). Where political units are directly accountable to those affected by their activities broad leeway should be given to them.

But where government lacks that accountability it may act in contravention of the interests and will of the people which it serves. Economic, social and environmental decisions affecting the entire population of central Arizona

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[21] At oral argument, counsel for the Tulare District dwelled at length on its business purpose. Transcript of oral argument 34, 40-41, 43. Even so, appellants in *Salyer* were, "of course, entitled to have their equal protection claim assessed . . . ." *Salyer* 410 U.S. at 730.

cannot be constitutionaly restricted to a small clique representing one narrow segment of our community—large landowners. The unrestrained and omnipresent power of the District is not "within the scope of relevant limitations imposed by the United States Constitution" when it is coupled with virtual total unaccountability to the public at large.

The Court of Appeals correctly noted that the acreage-based voting system was not the constitutionally correct way to insure that the District followed its purported purposes:

> In this Court the District makes repeated reference to statutory and decisional authority indicating that the District's principal purpose and obligation is to provide water to the lands within it. If this legal proposition is correct, then the district will no doubt comply with it or be subject to corrective action by the courts or the Arizona legislature. It is not, however, an argument that justifies trying to skew the electoral system as an indirect way to produce that result.

613 F.2d at 185.

B. *The District's Heavy Reliance on Historic Purpose is Misplaced.*

The District would have the Court examine the constitutionality of its acreage-voting scheme in light of circumstances long since past. Although the purpose for which the District was organized three quarters of a century ago may explain why the land-based voting system still exists, this Court uniformly evaluates an equal protection challenge to legislation in light of present-day conditions.

This rule was applied most forcefully by this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), in determining whether separate but equal educational facilities were constitutional. The Court refused to examine public education under conditions of prior years:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted,

> or even to 1896 when Plessy v. Ferguson was written. We must consider public education in light of its full development and its present place in American life throughout the Nation. . . .

347 U.S. at 492-93. Time after time, this Court has stressed the relevancy of present facts over the past.

In *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924), an action was brought to enjoin an order of the Rent Commission of the District of Columbia reducing rent for an apartment building. The landlord complained that the "emergency which existed in 1919" had "come to an end" by 1922. The Court reversed the dismissal of the complaint, stating the rule of law as follows: "A law depending upon the existence of . . . [a] certain state of facts to uphold it may cease to operate if the . . . facts change, even though valid when passed." 264 U.S. at 547-48. *See, e.g., City of Rome v. United States*, 48 U.S. L.W. 4463, 4470 (April 22, 1980); *Leary v. United States*, 395 U.S. 6, 38 (1969); *Burrey v. Embarcadero Improvement District*, 97 Cal. Rptr. 203, 488 P.2d 395, 404 (1971).

Thus, the District's lengthy historic survey does not undercut in any way the contentions of the disenfranchised residents that its voting system is unconstitutional. The acreage-voting scheme must be measured against today's circumstances and the pervasive impact which the District has on its residents in 1980. Because the focus of this Court's inquiry must be in the here and now, the conclusion that the District's voting system is unconstitutional is unescapable.

CONCLUSION

Appellants mistakenly characterize the inevitable result of upholding the Court of Appeals' decision as vesting control of the District in its electric customers. But the question of remedy is a separate one from the question of

whether the current structure violates the Constitution. Formulating an appropriate remedy to redress the constitutional violation should initially be within the province of the Arizona Legislature.

The evolution of the District has been reflected by many legislative changes except one—its voting system. Because the one acre, one vote scheme is predicated upon facts and circumstances, which are now only of historic interest, it has become constitutionally infirm. The District's pivotal electric and water functions substantially affect the lives of all of its residents; it may not continue to carry out these essential activites under the control of large landowners alone.

Respectfully submitted,

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December 20, 1980

APPENDIX A

OFFICIAL STATEMENT
SALT RIVER PROJECT ELECTRIC SYSTEM
REVENUE BONDS, 1980 SERIES B AT 25

Outstanding Long-Term Indebtedness

Outstanding long-term indebtedness at July 31, 1980 consisted of Prior Lien Bonds (including loans from the United States of America), equipment contracts and Revenue Bonds, as shown below. In all years to date, Revenues Available for Debt Service have been more than sufficient to meet all debt service requirements and the District has never used its taxing power for the Prior Lien Bonds.

	Coupon %	Amount (as of July 31, 1980)	Future Maturities
General Obligation Bonds			
Issues No. 6 through 14	1 to 6	$ 229,600,000	1981-2003
Unamortized Bond Discount		(2,280,334)	
Total Net General Obligation Bonds Outstanding		$ 227,319,666	
U.S. Government Obligations		$ 13,029,137	1980-2004
Total Net Prior Lien Debt Outstanding		$ 240,348,803	
Electric System Revenue Bonds			
1973 Series A and B	5 to 6½	$ 142,205,000	1981-2011
1974 Series A and B	5.7 to 7.6	140,000,000	1983-2012
1976 Series A, B, C and D	4¼ to 7.2	404,150,000	1981-2016
1977 Series A, B Refunding and C	4 to 6⅛	394,215,000	1981-2017
1978 Series A, B and C	4.4 to 7	317,900,000	1981-2018
1979 Series A, B and C	4¾ to 7¼	281,045,000	1983-2019
1980 Series A	7.4 to 9¼	125,000,000	1985-2020
Total Electric System Revenue Bonds Outstanding		$1,804,515,000	
Unamortized Bond Discount		(27,061,667)	
Total Net Electric System Revenue Bonds Outstanding		$1,777,453,333	
Equipment Contracts		$ 1,290,439	1980-1983
Total Net Long-term Indebtedness		$2,019,092,575	

No. 79-1740

In The
Supreme Court of the United States

October Term, 1980

GERMAIN H. BALL, et al.,

Appellants,

v.

ROLAND W. JAMES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPELLANTS' REPLY BRIEF

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ARGUMENT

I.

INTRODUCTION

This lawsuit, despite its procedural cast as a "voting" case, is actually a challenge to substantive legislative policy choices effectuated by the acreage control system. Since the legislative policy which the appellees would subvert is primarily one of encouraging reclamation through private economic risk and reward and of protecting those economic benefits by acreage voting, this lawsuit is also an attempt to expropriate heretofore protected property rights. Thus, it can fairly be viewed as a request for social and economic policy legislation. It also seeks judicial redistribution of property value from those who earned it to those who have neither earned it in the past nor succeeded in persuading their one-person, one-vote legislature to transfer it to them for the future.

The appellees do not dispute that their requested relief will frustrate the historic reclamation priorities and the associated property expectations of the acreage control system. Indeed, to distract this Court from the substitution of judicial for legislative policy preferences, the appellees baldly assert that somehow, notwithstanding the legislature's refusal to abandon the primary reclamation purposes of the District, "the District's electric operations have an independent existence fully separate and distinct from its water activities." Brief of Appellees at 19. Like the Court of Appeals,[1] they would avoid confessing this usurpation of legislative policy choices by pretending that the legislative choices themselves have changed to subordinate water reclamation and investment protection to servicing the public with electricity and domestic water. This new purpose and priority, discovered out of thin air, is absolutely contrary both to the stipulated facts and to directly controlling Arizona case authority.

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[1] 613 F.2d at 184, *quoted in* Brief of Appellants at 27-28.

The *amici* are more candid in stating that the object of this lawsuit is to achieve by indirection an amendment of the legislative purposes of the District.[2] It is remarkable that some of the very purposes sought to be substituted here (flood control for water storage, environmental enhancement for reclamation) were also the very purposes which the unsuccessful plaintiffs in *Salyer*[3] and *Associated Enterprises*[4] hoped to achieve by their "voting rights" suits.

Voting—in the sense of participating in government—is a fundamental right for purposes of the Equal Protection Clause. It is so because it is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Voting for the Arizona legislature or the Phoenix City Council is that type of voting. But some other entities exist in our society, created under state law, in which control is exercised by "voting" different from the voting which is a fundamental right. American Telephone and Telegraph Company is an artifical entity created by the laws of New York, with enormous economic effects on millions of people, and controlled by a system of voting ordained by the New York legislature. Nevertheless, voting in AT&T is not a fundamental right, and the State of New

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[2] For example, one of the *amici* "has for five years opposed the transfer of funds from District electric revenues to subsidize water use." Brief of *Amici Curiae* at 4. Another *amicus* "would like to see the District seek broader authority to utilize its dams to provide more than incidental flood control." *Id.* Another represents people who live in or near a usually dry river bed and whose land values depend on an assured absence of water rather than its assured supply. This *amicus* specifically desires, through this lawsuit rather than purchase or condemnation, to divert the storage capacity of District dams and to reverse the 70 years' policy under which "the District retains maximum amounts of water for agricultural irrigation rather than to utilize the dams in a multipurpose manner including the provision of flood control for the Phoenix metropolitan area." *Id.* at 6.

[3] *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

[4] *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973).

York is not constrained by one-person, one-vote principles when devising voting systems for AT&T.[5]

Similarly, other artifical entities exist which, though labeled municipal by state law, are in purpose and effect much like AT&T and not at all like the City of Phoenix. *Salyer* holds that "voting" in these entities is not a fundamental right and not subject to the one-person, one-vote strictures applicable to political and governmental entities.

This lawsuit is grounded on an historical circumstance of labels. As a matter of legislative intent,[6] actual causal motivations of its creators,[7] economic reality,[8] effects upon the public,[9] Arizona case law,[10] and stipulation of the parties to this suit,[11] this District is "essentially a business corporation,"[12] notwithstanding the District's "municipal" label under state law. That mere label does not render voting in *this* entity a fundamental right of equal dignity with freedom of speech, freedom of religion, and voting for state legislators. *Salyer* necessarily holds that a "municipal" categorization under state law does not *ipso facto* bring with it real political or governmental status and therefore strict scrutiny of control systems.

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[5] *Davis v. American Telephone and Telegraph Co.*, 478 F.2d 1375 (2d Cir. 1973).

[6] Brief of Appellants at 21-24, 26-28.

[7] Facts ¶¶ 32, 33, 34; J.A. at 31.

[8] Brief of Appellants at 21-24, 26-28.

[9] Brief of Appellants at 24-26.

[10] Brief of Appellants at 21-24, 26-28.

[11] Facts ¶¶ 32, 33, 34; J.A. at 31.

[12] *City of Mesa v. Salt River Project Agricultural Improvement and Power District*, 92 Ariz. 91, 103, 373 P.2d 722, 731 (1962); *see Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. 30, 43, 275 P.2d 393, 402 (1954).

The issue in this case is whether the appellees have a fundamental right which is violated by this District's acreage control system. But the issue is not whether "voting" is a fundamental right. It is whether *customer* voting in a business entity created by private risk and fostered by the state is a fundamental right.

Analysis of the Brief of Appellees reveals two controlling deficiencies: (1) there is no constitutional basis for the attempt to gain customer control of the District, and (2) appellees' own argument demonstrates that this case falls within the letter and spirit of *Salyer*.

II.

THE VIEWS OF THE APPELLEES AND THE *AMICI* CONCERNING THE ENTITLEMENT OF CUSTOMERS TO CONTROL THE DISTRICT NOT ONLY LACK ANY CONSTITUTIONAL BASIS; THOSE VIEWS ALSO OFFEND FUNDAMENTAL PROPERTY VALUES THAT ARE CONSTITUTIONALLY BASED.

As noted, the *amici* have been more candid than the appellees in acknowledging the purpose of this lawsuit and its effects, if successful. Relying on the state constitutional provision denominating the District a politicial subdivision, they assert that "the District does not belong to private owners; it belongs to the public." Brief of *Amici Curiae* at 9. This forthright statement has always been an essential foundation stone of the appellees' case.

There are at least three answers to the assertion that the District belongs to the public. The first is that the assertion is totally contrary to specific statements of the Arizona Supreme Court. In *Local 266, I.B.E.W. v. Salt River Project Agricultural Improvement and Power District*, 78 Ariz. at 44, 275 P.2d at 402-03, the court said:

> The public does not own the District. . . . Instead the owners are private landowners. . . . The public interest is merely that of consumers of its product, for which they pay. . . .

That characterization of the District has been reiterated as recently as 1979 in *Niedner v. Salt River Project Agricultural Improvement and Power District*, 121 Ariz. 331, 333, 590 P.2d 447, 449 (1979).

The second answer is that the assertion of public ownership begs rather than answers the constitutional question. Merely calling an entity a political subdivision does not automatically entitle the public to "own" and control it. The heart of this Court's holding in *Salyer*, and its earlier dicta in *Avery*[13] and *Hadley*,[14] is that the strict judicial scrutiny rule of *Reynolds v. Sims* is inapplicable to some subdivisions of government—those special districts whose functions are limited and do not involve core governmental responsibilities. Because of the narrowness of its functions, the Salt River Project qualifies as such a special district. Therefore, it is outside the reach of *Reynolds v. Sims'* strict scrutiny standard.

The appellees have abandoned the assertion in their Motion to Affirm at 12 that the District has "all the attributes of sovereignty." They now argue that "towns, shops and hospitals are located within its boundaries." Brief of Appellees at 21. So are streets, schools, fire and police departments and the entire panoply of normal governmental activities. But these activities are not carried out by the District. The District's activities are limited to the conservation, storage, and delivery of raw untreated water, and electric service which provides the support for those water

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[13] *Avery v. Midland County*, 390 U.S. 474, 483-84 (1968).

[14] *Hadley v. Junior College District*, 397 U.S. 50, 56, 58-59 (1970).

operations.[15] This Court has held that neither of those endeavors amounts to normal governmental activity.[16] Everything this District does is also done by similar private business corporations. Indeed, everything this District does *was done* by a private business corporation (the Association) before the District was formed as its mirror image.

All of appellees' discussion concerning the distinction between urban and rural water uses is beside the point, unless *Salyer* is to be overruled. This Court has never suggested that a special district loses that status because it

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[15] The appellees' most recent attempt to avoid the controlling stipulation that the electric operation is subsidiary to the District's primary water reclamation function is found in Brief of Appellees at 18 n.14, which asserts that the *initial* purpose was reclamation but that during the interim the electric power activities have acquired an independent significance. This latest attempt to explain away this dispositive fact is no more adequate than the earlier ones. (*See, e.g.*, Motion to Affirm at 3 n.2.) The stipulations deal not only with the District's original purpose (Facts ¶¶ 16, 17; J.A. at 24-25) but also with the present. Facts ¶ 34 (J.A. at 31) stipulates:

> . . . Subsequent to its formation in 1937, the District *has continued* to use electric revenues to defray the expense of providing water to District lands. The primary legislative purpose of the District *is* to provide water to District lands. (Emphasis added.)

[16] *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. at 728-30; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The appellees would apparently distinguish these cases on the ground that the District engages in delivery and conservation of underground as well as surface water. There is nothing in the *Salyer* opinion, nor in logic, which suggests that the special district status of a district engaged in water conservation and delivery activities diminishes where the source of its water is underground as well as surface.

serves some urban areas.[17]

The appellees' reliance on *Cipriano v. City of Houma*, 395 U.S. 701 (1969), is completely misplaced. The distinction between this case and *Cipriano* is that the City of Houma is a city with the full range of governmental powers. A city already belongs to the public. All its functions, when performed by a city, are public, not because of any public nature of the function itself, but because of the purely public, governmental nature of the entity. There is no suggestion in *Cipriano* or any other case that the sale of electricity confers the general governmental status that requires control of the enterprise by the customers. *Jackson v. Metropolitan Edison Co.* holds to the contrary.

The third reason for the insufficiency of the assertion that "the public owns the District" is that it results in confiscation. The funds for the creation of this District were provided by debt incurred by the landowners and secured by their lands and by acreage assessments. The only public money came from the United States, and that was in the form of loans, which the landowners were obligated to repay. The assertion of public ownership over a district whose risk capital came from private investors rather than tax revenues would jeopardize basic Fifth Amendment values. Both in its creation and in the satisfaction of its continuing need for funds there is no material difference between the financial arrangements of the Salt River Project and those of any other investor-owned utility, or, for that matter, any other profit-motivated enterprise. In the typical case of entrepreneurial risk-taking, the initial investment capital is provided by the owners, involving a combination of equity capital and debt. (Equity capital usually comes from sales

[17] The statement that the "District's water operations are only partially related to land ownership because 40% of District water is used for urban purposes" (Brief of Appellees at 22) is both a non sequitur and false. The District's water operations are in fact "related to land ownership" precisely because the entitlement to the water depends *exclusively* upon land ownership. This is no less true for urban lands than for any others.

of stock; here it came from acreage assessments.) Once the venture gets underway, customer sales are the principal source of operating funds; periodic expansion and other unusual needs are met either through retained earnings or additional capital investment, shareholder contribution or shareholder borrowing. Of the three groups whose money is involved in the venture—owners, creditors, and customers—the owners bear the greatest risk; and the customers bear none. The necessary accompaniments to this risk are the right to control the enterprise, and the right to the profits, if any.

The appellees' views concerning risk are incredibly naive: "The landowners have invested none of their own money in District operations. Their 'risk' is limited to the lien on District land . . . ." Brief of Appellees at 23. The statement is inadequate for two obvious reasons. First and most important, risk capital does not lose its quality as such simply because it is supplied by those who borrow money against the security of their property. Second, even in the narrow sense intended by appellees, the statement is false. While most of the money to build the Project came from borrowing—either from the United States or from bondholders—some came from acreage assessments imposed on the Project's landowners.

Once again, the *amici* are more forthright. They acknowledge, as any objective observer must, that the Salt River Project was built through landowner risk, but they contend that "those landholders have been well compensated for their risks . . . through the enhancement of the value of their lands." Brief of *Amici Curiae* at 10. The obvious import of this argument is that the owners have made their investment and for a period of time have had a return on it. Now it is time to turn it over to the public. This suggestion is tantamount to nothing less than expropriation. The obvious reason for the "enhancement of the value of their lands" is the water subsidy. (Facts ¶ 55; J.A. at 39.) Removing or altering that subsidy would affect land values just as surely as customer control over Arizona Public Service's

dividends would affect the value of its stock.[18] The notion that property rights in investment capital are protected from public confiscation only for a finite initial period, after which they may be taken over by the public, is irreconcilable with the Fifth Amendment's just compensation clause.

The appellees have another argument: that whatever may have been the case initially, today the money that operates the Salt River Project comes from the ratepayers, whose electric payments account for 98% of the District's revenues. The revenues to which appellees refer are sales revenues; 98% of total District revenues comes from electric sales and 2% from water deliveries. The short answer to this argument is that when he pays his monthly bill the electric customer is paying only for electricity. He is not making a capital acquisition. In this respect as in many others, the District's electric customer is identical to any other electric customer. The stipulated facts show that there is no material difference between the District's rates and those of other investor-owned utilities. (Exhibit K, pp. 4-30; Exhibit L, p. 1.) Moreover, the return on investment to the District's landowners is about the same as the dividends paid to common stockholders in comparable electric utility companies. (Facts ¶ 56; J.A. at 40.)

In light of these stipulated facts, the fact that 98% of the District's sales revenues comes from electric customers is irrelevant. In the case of Arizona Public Service and Tucson

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[18] Appellees argue that, since the District's general obligation bond covenants require that rates always be sufficient to pay off bonds, there should be no concern that a popularly-elected board would lower rates to the point that an acreage assessment or acreage tax would ever have to be imposed. Brief of Appellees at 24 n.17. But they ignore the fact that the bond covenants do not require rates sufficient to maintain existing levels of efficiency of and support to the water system. This is the primary concern here. Consequently, destruction of the water subsidy, and therefore of land values, could occur without any violation of the bond covenants.

Electric Power, 100% of sales revenues comes from electric customers. That does not give those customers a constitutional right to control the company, or any other ownership interest.

A similar argument is that the amount of general obligation bond debt secured by Project lands is diminishing and that shortly after the turn of the century all of the general obligation bonds will have been retired. This argument is also deficient for several reasons. First, *Salyer* requires disproportionate effect on landowners. In the case of the District, the disproportionate effect is found principally in the benefit (earned through risk and investment) to Association-subscribed lands. This disproportionate benefit is an effect that is independent of the bond liens. This benefit is also another feature that distinguishes the instant case from *Cipriano* and *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). Apart from the fact that the primary disproportionate effect of the District is the benefit conferred on landowners, appellants have never suggested that the acreage voting system rests on revenue bond obligations or even that it rests strictly on the burden of general obligation liens (though they cannot be considered insignificant since current bonds will remain outstanding for another quarter of a century, and new general obligation bonds could be issued). (*See* Facts ¶ 43; J.A. at 35.)

The contention that "time after time, this Court has stressed the relevancy of present facts over the past" (Brief of Appellees at 34) overlooks the controlling fact that in this case—unlike any of those discussed by the appellees—the past history of the Salt River Project includes landowner investment. This District was created when a private corporation transferred its assets and powers to take advantage of tax-free bonding for additional financing. No decision of this Court has ever suggested that the Constitution precludes the traditional cornerstone of free

enterprise that investment includes risk, benefits, and control. This is no less true merely because the state also has conferred an economic benefit in order to foster a legitimate state policy—in this case, reclamation.

There is no constitutional requirement of customer control; indeed, it would result in confiscation of landowner property rights.

III.

THE APPELLEES' ARGUMENTS DEMONSTRATE THAT THIS CASE FALLS WITHIN THE LETTER AND THE SPIRIT OF THE *SALYER* HOLDING.

Appellees consistently attempt to avoid the stipulations that water reclamation is the District's primary purpose and that the sale of electricity is subsidiary to it. Implicit in this attempt is a recognition that under *Salyer* the selection of the board of directors for a water reclamation project is governed by the rational basis test. The appellees also recognize that historically the Salt River Project has been a reclamation project, and that the Arizona courts say it still is.[19] Their responses are that this Court should disregard the Arizona courts' characterizations (and the stipulations) and make its own determination that the original purpose of the District has changed. Brief of Appellees at 32.

In view of the fact that constitutionality turns on function, not size of the district, just how has this District changed? The fact that it sells electricity? Or the fact that it delivers water to cities, who in turn treat and deliver the water to its owners? Electric sales as a subsidy for reclamation have been an integral part of the Salt River Project's reclamation operations almost from the beginning—decades before there was a District. One of the obligations imposed on the Association by the United States in the 1917 contract was the responsibility "for the service of electric

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[19] Brief of Appellees at 32; *City of Mesa v. Salt River Project Agricultural Improvement and Power District*, 92 Ariz. at 103-104, 373 P.2d at 731; *Niedner v. Salt River Project Agricultural Improvement and Power District*, 121 Ariz. at 332, 590 P.2d at 448.

energy."[20] With respect to water, the District simply is not in the same category as the Imperial Irrigation District in *Choudhry v. Free*, 17 Cal. 3d 660, 552 P.2d 438, 131 Cal. Rptr. 654 (1976), which "supplies all the water and electrical power needs of Imperial County, and to portions of Riverside and San Diego Counties."[21] The result in *Choudhry* was mandated by several factors entirely absent from

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[20] Exhibit C, p. 1.

[21] 17 Cal. 3d at 663, 552 P.2d at 440, 131 Cal. Rptr. at 656. The District's water functions are much more analogous to *Salyer* than to *Choudhry*. Appellees attempt to create a contrary impression. They claim that, "The Arizona Legislature has vested the District with many special and significant powers over water allocation and management not only within, but also beyond, the District's geographic area." Brief of Appellees at 6. The statute cited does not support the claim that District water powers are either special or significant. Ariz. Rev. Stat. § 45-172 (Supp. 1980) is a section of the surface water code which sets out the circumstances under which certain vested water rights may, with the approval of and subject to conditions imposed by the Director of the State Department of Water Resources, be severed from appurtenant land and transferred to other places of use. One of the many conditions is that if the water right is appurtenant to land within the boundaries or watershed of an irrigation district, agricultural improvement district, or water users' association, the district or association must approve (obviously to protect the water rights of the landowners within its area) any severance and transfer. That obligation is neither special to this District nor as significant as other water powers the District readily acknowledges.

this case.[22] This District delivers raw water to the cities, not on the basis of need, but on the basis of entitlement, both in the cities' own right as landowners and on behalf of those landowner residents who have designated the cities as agents for the purpose of receiving water. The cities pay the same delivery charge per acre foot for raw water as any other landowner. Persons living within the cities but outside Project boundaries are not entitled to Project water and they receive none.

The request that this Court make its own determination concerning the District's purposes, priorities, and powers necessarily asks either for original findings of fact contrary to the stipulations (especially ¶¶ 16, 17 and 34; J.A. at 24-25, 31), or an interpretation of the Arizona statutes contrary to the interpretations of the Arizona courts. The appellees concede that the holdings of those courts are at odds with their positions: "The historic purpose and categorization of the District by Arizona Courts are not and

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[22] Perhaps the most important was that district's wide-ranging co-equal purposes, which included power sales and flood control "without regard to whether such functions are ancillary to irrigation," water treatment, sewage disposal, recreation, and sale of water for fire protection, irrigation, and domestic use. 17 Cal. 3d at 663, 667, 552 P.2d at 439-40, 442-43, 131 Cal. Rptr. at 657, 658-59. Rather than merely delivering water to land to which it is appurtenant (as is the District's function here), the Imperial District actually allocates water between agricultural and nonagricultural uses. 17 Cal. 3d at 665, 552 P.2d at 441, 131 Cal. Rptr. at 657. None of these activities are authorized for the District here, let alone elevated to a co-equal status with delivery of water to its owners.

The other cases cited in Brief of Appellees at 11 n.12 are different from this case. *Baker v. Regional High School District No. 5*, 520 F.2d 799 (2d Cir. 1975), involved a school board performing "what has traditionally been a vital governmental function." 520 F.2d at 801. The primary purpose of the entities in *Johnson v. Lewiston Orchards Irrigation District*, 99 Idaho 501, 584 P.2d 646 (1978), and *Wright v. Town Board of Carlton*, 41 App. Div. 2d 290, 342 N.Y.S. 2d 577 (1973), was the supply of domestic water, not raw water to which landowners had a legal entitlement based on their land ownership. In neither of those cases was there a disproportionate effect on landowners comparable to the agricultural water subsidy in this case.

cannot be disputed."[23] Appellees would dismiss those holdings with a line of dictum from a criminal case, *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). The question here, unlike that in *Alford*, concerns the powers and purposes of special districts created by Arizona statutes. The interpretation of Arizona statutes is the exclusive province of the Arizona courts.[24]

Thus, the only relevant change in the District is the undisputed fact that it now serves more customers than in the past, and that more of them live in cities. The Brief of Appellants points out three reasons—based on precedent, policy, and practicality—why the selection of the governing

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[23] Brief of Appellees at 32. The most recent pronouncement concerning the highly limited nature and function of Arizona special districts was handed down September 30, 1980, by the Arizona Court of Appeals in *Pinetop v. Ferguson*, No. 1 CA-CIV 4567:

> In our opinion, the adoption of Art. 13, § 7 was never intended to change the basic nature of improvement districts or to grant them governmental powers on a par with cities, counties or the state itself. We do not read it as vesting them with any powers or privileges above and beyond those strictly necessary to carry out their limited functions. In fact, cases construing this constitutional provision have taken great pains to distinguish the limited proprietary purposes of such improvement districts from the primarily governmental functions of other government entities. *Taylor v. Roosevelt Irrigation District* [71 Ariz. 254, 226 P.2d 154 (1950)]; *Santa Cruz Irrigation District v. Tucson*, 108 Ariz. 152, 494 P.2d 24 (1972); *City of Mesa v. Salt River Project*, 92 Ariz. 91, 373 P.2d 722 (1962); *Valley National Bank v. Electrical District No. 4*, 90 Ariz. 306, 367 P.2d 655 (1961).

[24] Among the controlling holdings of the Arizona Supreme Court is its statement from *Uhlmann v. Wren*, 97 Ariz. 366, 383, 392, 401 P.2d 113, 124, 130 (1965), that the District's power activities could only be "an incidental phase of reclamation, not a primary or independent end in itself," because the only reason for sale of power is "the use of power revenues to support its primary irrigation and reclamation functions." Appellees' wholly unprecedented suggestion that Ariz. Rev. Stat. §45-903(A)(6) permits independent District power sales unrelated to support of reclamation is rejected by the holding in *Uhlmann v. Wren*, 97 Ariz. at 372, 401 P.2d at 116, and the stipulated facts. The historical fact is that the District engages in power activities under Ariz. Rev. Stat. §45-903(A)(7) "to reduce the cost of development, storage and distribution of water to District lands." (Facts ¶ 34; J.A. at 31.)

constitutional standard should continue to turn on function rather than size. The Brief of Appellees highlights an additional reason why the difference on which the appellees rely—the number of people served by the District—makes the case for constitutionality stronger here than in *Salyer*.

Any objective comparison of this case and *Salyer* in terms of (1) the magnitude of the effects on the individual and (2) the ability of the individual to do anything about those effects, compels the conclusion that constitutionality here follows *a fortiori* from the holding in *Salyer*. The reason for that result is the very feature of this case that the appellees and the Court of Appeals find so objectionable: the size of the Project and the number of people it serves.

The people served by the Salt River Project are the same people who elect Arizona's policy makers. The appellees correctly point out that the number of those people is large and growing. Included within the District's boundaries are all or part of seventeen of the State's thirty legislative districts. Among the legislative leaders who live in these districts are the Senate President, House Speaker, and both Senate and House Majority Leaders. To whatever extent the District's customers share the substantive views of the appellees and the *amici* they can make their views felt through the people who have defined the narrow purposes of the District,[25] the elected members of the Arizona legislature. As stated by Justice Stevens, concurring in the judgment in *City of Mobile v. Bolden*, _____ U.S. _____, 100 S.Ct. 1490, 1508, 1511 (1980): "For the political strength of a group . . . is a function of numbers—specifically the number of persons who will vote in the same way."

In *Salyer*, some of the individual interests were enormous, involving nothing less than the security of home and job, yet the individuals had no power to effect changes. One corporation effectively controlled the district. Even more

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[25] *See Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. at 744-45.

important, since the number of persons living within the Tulare Lake Basin Water Storage District was small, their chances of bringing about any legislative change were limited. Although there were adverse impacts on the people actually living within the district, the Court upheld the acreage voting system.

And what are the adverse impacts on the individuals in this case? Despite an invitation in the Brief of Appellants, the appellees have never identified just how their interests are adversely affected by the District. They have merely stated that they would like to control the District, and pre-

sumably they would like lower electric rates.[26] However, even if the agricultural water subsidy were entirely eliminated, the average cost saving per electric user would be considerably less than $1.00 a month. The *amici* are a bit more forthright. Some would like the District to be more active in flood control. Others want to get the district out of fossil fuel and nuclear generation, while still others feel that the District's environmental efforts have been insufficient.

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[26] Though they do not make clear precisely how it would be relevant to the constitutional analysis, appellees emphasize that electric rates set by the District are not reviewed by the Arizona Corporation Commission, as are the rates of private electric utilities. Brief of Appellees at 8-9. Of course, the Constitution does not require the states to regulate all similarly situated businesses in identical ways. Arizona's experimentation in regulating the District differently from other private utilities is within its range of discretion. Indeed, the fact that District electric rates have always been comparable to or lower than those of private electric utilities regulated directly by the Corporation Commission suggests the soundness of the State's decision that District electric rates need not be directly set by the Commission.

Moreover, the appellees have never argued that they are hurt by the absence of Corporation Commission rate regulation. The reasonableness of District electric rates has never been challenged in court by the appellees or anyone else. In fact, the innuendo of the Brief of Appellees at 9 that there is no judicial review of District electric rates is false. Even though District rates are not set directly by the Corporation Commission, municipal utility rates are subject to judicial review in the Superior Court and will be upset if they are unreasonable. *Town of Wickenburg v. Sabin*, 68 Ariz. 75, 200 P.2d 342 (1948).

Appellees also neglect to inform the Court that, by virtue of the nexus between the District's power activities and the federal reclamation project, the Secretary of the Interior has comprehensive power to supervise the District's management of the Salt River Project, "including the power operations." (Facts ¶ 59; J.A. at 40-41.) The Secretary has never found it appropriate to revise rates set by the District. *Id.* The District is subject to other types of state and federal regulation. *E.g.*, Ariz. Rev. Stat. § 45-1065 (Supp. 1980) (subjecting issuance of District revenue bonds to Corporation Commission approval); Ariz. Rev. Stat. §§ 40-360.01, *et seq.* (Supp. 1980) (subjecting District plant and power line siting to regulation by the Power Plant and Transmission Line Siting Committee); 16 U.S.C. §§ 2601-2645 (the Public Utility Regulatory Policies Act of 1978, requiring study of numerous rate procedures and rate structures by many utilities, including the District.)

The appellees observe that changes have occurred in the eighty years of the Salt River Project's existence and that "these changes . . . have been facilitated practically every step of the way by the Arizona Legislature through amendments to the District's enabling act." Brief of Appellees at 4. Choices between opposing points of view on the kinds of issues raised by the appellees are the essence of the legislative process. Moreover, the choices in this case are highly localized; the people affected are the people of the State of Arizona. Nowhere is there any suggestion that the Arizona legislature has not or cannot facilitate necessary or desirable policy choices without judicial mandate.

Deference to legislative judgment is the cornerstone of the rational basis standard, which, as discussed in the Brief of Appellants at 18 and 37, should govern this case. For reasons discussed more fully in the opening brief, especially part III, it was reasonable for Arizona to adopt and implement a policy that encourages landowner investment in reclamation activities, with concomitant public benefits such as increased total available water and encouragement of land use for agricultural purposes. Judicial deference to the legislative judgment is particularly appropriate in this case because the appellees' interests in the Salt River Project are mostly economic, and economic policy issues are the province of the legislature. The difference between this case and *Salyer* is a difference in the number of people served. If the difference matters at all, it makes this case even more appropriate than *Salyer* for application of the rational basis test because the consumers' greater numbers

allow them to influence the State's legislators.[27]

CONCLUSION

This case can and should be decided on the narrow ground that *Salyer* governs and that the District's representational scheme, which is acreage based but partially customer oriented, satisfies the rational basis test. This Court's test properly focuses on function rather than size; to the extent size may be relevant at all it strengthens the case for constitutionality. The effect of such a holding would be to leave the underlying issues of legislative policy to the legislature.

The legislative process, unlike the constitutional adjudication process, has the capability for fine tuning adjustments as well as massive change. For almost half a century the Arizona legislature has expressed its policy supporting and facilitating private investment in reclamation. While the basic policy has been repeatedly reaffirmed, numerous modifications in implementation of the policy have been made by legislative amendments over the years, including modification of the voting statutes for agricultural improvement districts. It is the legislative process that has functioned and should continue to function in the gov-

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[27] The appellees call into question the reasonableness of another feature of the District's voter representation by informing the Court that the owners of 40% of lands within the District are not entitled to vote those lands. What they do not inform the Court is that the excluded lands are "streets, alleys, canal rights-of-way, and the Salt River riverbed." (Facts ¶ 35; J.A. at 31-32.) In addition, property held by corporations and municipalities or other governmental bodies may not be voted, "but property held by municipalities or other governmental bodies is not subject to the District's taxing power." *Id.* The exclusion of municipal property and corporate property clearly satisfies the rational basis standard, if for no reasons other than the municipal immunity from District taxation and the reasonableness of the judgment that District electors should meet the qualifications of state electors in general. Moreover, if exclusion of corporate and municipal lands were constitutionally deficient, the remedy would be a judgment enfranchising those lands, a remedy which the appellees have not sought, and which, at least as to corporations, they expressly disclaimed before the Court of Appeals.

ernance of the Salt River Project. The closing sentence of this Court's opinion in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 59 (1973) is particularly appropriate:

> But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

The judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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No. 79-1740

In The

Supreme Court of the United States

October Term, 1980

GERMAIN H. BALL, et al.,

Appellants,

v.

ROLAND W. JAMES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE*

Arizona Civil Liberties Union
Arizona Community Action Association, Inc.
Arizonans for a Better Environment, Inc.
Association of Community Organizations for Reform Now
Chicanos Por La Causa, Inc.
Citizens Concerned About the Project, Inc.
Human Development Council of the Catholic Diocese of Phoenix
Maricopa Audubon Society, Inc.
Metropolitan Phoenix Indian Coalition
Orme Alternatives Coalition
People United for Self Help
Valley of the Sun Grey Panthers

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COMPLIANCE WITH RULE 36.2

Pursuant to Rule 36.2, Rules of the Supreme Court of the United States, all parties to this case have consented to the filing of this brief. A copy of the letters requesting consent and the letters granting consent have been filed with the Clerk.

INTEREST OF THE AMICI CURIAE

The *Arizona Civil Liberties Union* is a statewide affiliate of the American Civil Liberties Union (A.C.L.U.), a sixty-year old organization dedicated to the advancement and defense of the principles enunciated in the Bill of Rights and Fourteenth Amendment of the United States Constitution. The A.C.L.U. and its Arizona affiliate subscribe to the proposition that "the right of suffrage is a fundamental

matter in a free and democratic society," *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964), and that preferred classes of voters in public elections are incompatible with the American system of representative self-government. The Arizona Civil Liberties Union opposes the retention of a preferred class of voters-landowners-in Salt River Project Agricultural Improvement and Power District (District) elections.

The *Arizona Community Action Association, Inc. (A.C.A.A.)* is a statewide association of community action programs and other organizations which provides counseling, training, technical assistance, and advocacy service to the poor in such areas as energy, health, housing, and nutrition. The *A.C.A.A.* has an energy advisory committee which is concerned with issues of energy conservation and utility rates as they affect low-income consumers. *A.C.A.A.* conducts workshops on energy conservation and is publishing a booklet on home energy conservation and budgeting. It has intervened in hearings of the Arizona Corporation Commission (Commission) where privately-owned utility companies have presented rate increase requests, and the *A.C.A.A.* has successfully filed suit overturning rate increases approved by the Commission. *A.C.A.A.* staff have also participated in advisory committees established by the District and have witnessed first hand the limited public input permitted in District electric rate-setting activities.

Arizonans for a Better Environment, Inc. (A.B.E.) is an Arizona non-profit corporation dedicated to preserving and enhancing the environment. It is funded primarily through donations from persons residing within the District and has a membership of about 2500. *A.B.E.* favors increased use of solar energy and energy efficiency improvements as alternatives to nuclear and fossil-fuel power generation. The District is participating in the Palo Verde Nuclear Generating Station presently under construction near Phoenix, Arizona, and operates numerous fossil-fuel fired plants. If completed, Palo Verde will be the largest nuclear power plant in the United States. Because the health and safety risks associated with this nuclear power plant will be shared

by all residents of the District, and because fossil-fuel plants (particularly coal) pose serious health risks, *A.B.E.* believes that decisions to build new electric plants are too important to be left to large landowners alone.

The *Association of Community Organizations for Reform Now (A.C.O.R.N.)* is a non-profit corporation with chapters in twenty states. Its purpose is to promote and coordinate organization and self-help in low and moderate income neighborhoods. The Arizona branch of *A.C.O.R.N.* has ten local chapters within the Phoenix metropolitan area which have organized to address such issues of neighborhood concern as pesticide spraying, waste disposal, traffic control, police protection, and utility service. *A.C.O.R.N.* has intervened, presented testimony, and cross-examined at private utility rate hearings before the Arizona Corporation Commission. *A.C.O.R.N.* believes that its constituents within the Phoenix metropolitan area who depend upon the District for electric service are vitally affected by its many powers, whether or not they own land, and should thus be able to hold the District accountable through the electoral process for the rates, terms, and quality of its customer service.

Chicanos Por La Causa, Inc. (C.P.L.C.) is an Arizona non-profit corporation which provides social services, employment training, housing and consumer counseling, and commercial and economic development within a 93 square mile depressed "special impact area" that comprises the southern and central parts of the Phoenix metropolitan area. Most of this special impact area lies within the flood plain of the Salt River, and many of its residents rely on the District for electrical service. *C.P.L.C.* shares the concern of other participants in this brief that all residents of the District should be able to help shape the policies of the District Board of Directors in such areas as rate-making, energy development, and water management. Because of the vulnerability of *C.P.L.C.'s* special impact area to flooding and because of *C.P.L.C.'s* commitment to community and economic development in that area, *C.P.L.C.* is particu-

larly concerned that its constituents have an electoral voice in shaping the policies of the District which affect flood control. *C.P.L.C.* would like to see the District seek broader authority to utilize its dams to provide more than incidental flood control. J.A. 42-43. To the South Phoenix community, which lies south of the Salt River bed, past flooding has meant isolation and severe economic hardship. District water management activities affect the security of *C.P.L.C.'s* South Phoenix constituents in their homes and businesses, the degree to which they may be isolated by flooding from jobs, services, and facilities in other parts of Phoenix, and the success of their efforts to attract industry and business to provide economic growth and development for their community.

Citizens Concerned About the Project, Inc. (C.C.A.P.) is a non-profit Arizona corporation originally organized in 1973. It has approximately 500 members, most of whom are residents within the District's boundaries. Its basic purpose is to seek reform of Arizona water law and policy with particular concentration on the monetary impact on Arizona taxpayers of present water policies and subsidies. It has for five years opposed the transfers of funds from District electric revenues to subsidize water use. It is also concerned about the extent to which the District's pumping of groundwater results in depletion of groundwater supplies.

The *Human Development Council of the Catholic Diocese of Phoenix (Council)* was formed in 1971 to act as the "conscience of the diocese" in the area of social concerns. The *Council* conducts local diocesan activities relating to the United States Catholic Campaign for Human Development, disseminates information concerning poverty and proposes projects for relief of poverty, provides community mediation services in areas of human relations and human

rights conflicts, and acts as an advocate on issues involving human rights. The District's acreage-voting system adversely affects the *Council's* efforts in support of human rights of residents within the District.

Maricopa Audubon Society, Inc. is a non-profit Arizona corporation with approximately 1400 members, many of whom reside within the District's geographic area. It is a chapter of the National Audubon Society. *Maricopa Audubon's* most central concern is the conservation of wetlands in Arizona's arid environment. *Maricopa Audubon* is concerned with the wise uses of water and energy because of their impact on wildlife. The District's policies greatly affect the Salt and Verde River watersheds, an area of 18,000 square miles. The highest concentrations of non-colonial breeding birds in continental North America are found in the riparian habitat of this watershed. Among the bird species is a unique and endangered population of desert-nesting Bald Eagles. The operational policies of the District can have substantial impacts, either beneficial or adverse, on this riparian habitat.

The *Metropolitan Phoenix Indian Coalition (Coalition)* is a coalition of community organizations providing education, counseling, social services, and health care to the Phoenix Indian community. Among the activities of the *Coalition* are voter registration and education including the encouragement of members of the Phoenix Indian community to take an educated voting interest in public issues and elections. The *Coalition* regards the District as a public institution whose rate-making activities, watershed management, dam operations and development, and environmental policies have a pervasive effect on the members of the Indian community of the Phoenix metropolitan area.

The *Orme Alternatives Coalition (Coalition)*is a loosely-knit coalition of religious, environmental, taxpayer, and civil rights groups and individuals united in their opposition to Orme Dam and dedicated to the development and implementation of alternatives which will solve the Phoenix

area's flood control problems. Member organizations include the Fort McDowell-Yavapai Tribe, the Inter-Tribal Council of Arizona, the National Congress of American Indians, the National Tribal Chairman's Association, the Friends' Meeting of Phoenix, the Lutheran Social Ministry of Arizona, the Presbytery of the Grand Canyon, the Arizona Ecumenical Council, and the Committee to Save the Fort McDowell Indian Community. Orme Dam is a $600 million proposed feature of the Central Arizona Project (C.A.P.). The C.A.P. is a multi-billion dollar project designed to bring Colorado River Water to central Arizona. The District's agent, the Salt River Valley Water Users' Association has entered discussions to become operator of the C.A.P. and as such would assume operation of Orme Dam. Orme Dam would be located at the confluence of the Salt and Verde Rivers upstream from Phoenix and would flood most of the Fort McDowell Indian Reservation resulting in the forced relocation of the Yavapai Indians from their ancestral homeland. One of the alternatives to Orme Dam presently being studied by the United States Water and Power Resources Service and the Army Corps of Engineers is the "reoperation" of District dams. Under this concept, new operating procedures would be employed at the six District dams on the Salt and Verde Rivers to reduce flood flows. At present the District retains maximum amounts of water for agricultural irrigation rather than to utilize the dams in a multipurpose manner including the provision of flood control for the Phoenix metropolitan area. J.A. 42-43. The *Coalition* opposes the District's one acre, one vote system because the interests of large landowners conflict with the needs of the rest of the Phoenix area residents.

People United for Self Help, Inc. (P.U.S.H.), an Arizona non-profit corporation, is an organization of and for disabled persons and their families in Maricopa County, Arizona. Among educational programs *P.U.S.H.* conducts

for its member families is a program in energy conservation. The rates, terms, and quality of electric service provided by the District have a great effect on the lives of *P.U.S.H.*'s disabled members and clients.

The *Valley of the Sun Grey Panthers (Grey Panthers)* advocate the interests of the elderly of the Phoenix metropolitan area on a variety of public issues, and among those issues are the rates and terms of utility service. Many of the members and constituents of the Grey Panthers are retired and live on fixed income, and they sharply feel the effects of increases in electric rates. Like other organizations who join in this brief, the *Grey Panthers* have actively participated in proceedings before the Commission and have felt the frustration of not having any meaningful procedure with respect to electric rate decisions by the District.

ARGUMENT

I. THE DISTRICT EXERCISES SIGNIFICANT AUTHORITY ON MATTERS OF IMPORTANCE TO ITS RESIDENTS WITHOUT ANY PUBLIC CONTROL OR ACCOUNTABILITY.

The Court of Appeals characterized the District[1] as a public entity whose operations vitally affect the economic interest and natural environment of the citizens within its boundaries. 613 F.2d at 185. Though Appellants challenge that characterization, the facts demonstrate its accuracy. The District is a political subdivision of the State of Arizona with the legal status of a municipality. ARIZ. CONST. art. 13, § 7. The District Board of Directors has broad and unrestricted power to direct District operations and affairs. ARIZ. REV. STAT. ANN. §§ 45-935-37 (Supp. 1980) Because members of the Board are chosen through an acreage-based electoral system which excludes nonproperty owners from participation and dilutes the voting strength of small landowners, the voting strength of large landowners is magni-

[1] It should be emphasized that the "reclamation" activities of the District exist separate and apart from its existence under Arizona law. J.A. 20.

fied. ARIZ. REV. STAT. ANN. §§ 45-909, 983 (Supp. 1980) The Board, however, makes public policy and exercises power in ways which substantially affect all District residents, property owners and nonproperty owners alike.

Appellants themselves accurately describe the substantial interest of all District residents in its policies and activities concerning water conservation:

> Because of the scarcity of water in Arizona, water conservation is central to a broad range of public policy issues facing Arizona's policy makers.

Brief of Appellants at 6.

> Indeed, of all Arizona resources, none is more scarce than water. There are few issues facing Arizona policy makers that are as important as how its water supplies are to be distributed among those interests that compete for them: residential development, mining, open space preservation, agriculture, industrial development, and others.

Id. at 45.

Appellants are correct that few issues facing Arizona policy makers are as important as water conservation and management. They fail to appreciate that the import of that issue extends to nonlandowners and small landowners as well as large landowners and that nonlandowners and small landowners have an important interest in participating in the election of public officials — District Board members — who plan and implement water policy.

A related issue is flood control. Whether and to what extent District facilities are utilized to provide flood control to the flood-ravaged Phoenix metropolitan area is of substantial interest to all its residents whether or not they own land. *See* J.A. 42-43.

What is said of the public interest in water conservation and management can be similarly said of the public interest in energy conservation and management. There are few more important issues of public policy. More than a quarter

of a million residents rely on the District for electric power, as the Court of Appeals observed. Further, the District owns five hydroelectric facilities and four steam generating plants; it is a partial owner of three coal-fired steam generating facilities; and it is a participant in the Palo Verde nuclear plant. 613 F.2d at 183. District policies concerning the burning of fossil fuels, the development of nuclear power, and the development of solar energy affect the cost-of-living, health, safety, and environment of all District residents, not just those who own real property.

Through Appellants invite comparison of the District with privately-owned utility companies, such comparison demonstrates that private utilities which operate in Arizona are more accountable to their customers and to the public for their rates and terms of service than the District, a public entity. The Arizona Corporation Commission, a popularly elected body, prescribes "just and reasonable rates" for private utility service and has authority to regulate all aspects of such service. ARIZ. CONST. art. 15; ARIZ. REV. STAT. ANN. § 40-321 (1956).

The District, by contrast, is exempt from regulation by the Arizona Corporation Commission. ARIZ. CONST. art. 13, § 7; art. 15 § 2. The District does not belong to private owners; it belongs to the public. Yet it is not accountable to the public for its rates and terms of service through the regulatory process; nor is it accountable through the electoral process. It is a public entity wielding public power, yet a large part of the public which bears its costs is foreclosed from participation in the election of the public officers who make its policies and direct its operations.

II. THE DISTRICT'S ONE ACRE, ONE VOTE SYSTEM IS UNCONSTITUTIONAL.

The nature and scope of District operations are such that it is preposterous for Appellants to deny their substantial impact on all District residents. Though District landowners may once have borne the cost of District operations, power users now bear virtually all of the costs without re-

gard to ownership of land. J.A. 36. Though the District may have commenced electric development and service as merely an incidental feature of water storage and delivery, its power operations have now taken on independent significance. This Court has previously upheld the constitutionally protected voting interest of utility customers in elections which affect the rates, terms, and quality of utility service, *Cipriano v. City of Houma*, 395 U.S. 701 (1969), and that interest is at issue in this case.

Appellants themselves acknowledge the vital importance to all District residents of the District's water conservation and management policies, and the same can be said of the District's policies concerning the conservation, development, and generation of electric power. The interest in the District's water and energy policies is not limited to landowners. Its policies are public policies; its acts are public acts; and those members of the public who own no land should not be foreclosed from participating in the public elections by which its policy makers and executors are chosen.

Appellants argue that the landowners who started the District put their land at risk and subscribed to the formation of the District only because the Arizona statutes under which the District was created gave them voting control proportionate to their landholdings. Those landholders have been well compensated for their risks, as Appellants themselves acknowledge, through the enhancement of the value of their lands. Brief of Appellants at 7.

While the District lands have increased in value, however, the nature of the District has changed. Though it once served a largely rural, agricultural area, and though its utility operations were once minimal, it now serves a rapidly growing metropolis, and its utility operations are vast in extent and in effect.

The District Board actively makes policy concerning water and power conservation and management, two of the most important public issues to all who live within its boundaries. It is a public body, and its scope of operations is now such that it can no longer remain the electoral captive of the large landowners who have controlled it from the start.

It is virtually self-evident that it is inconsistent with American principles of democracy that landowners should exclusively control the election of a body of public officers whose policies so vitally affect the public interest as the Salt River District Board. It is similarly self-evident that the electoral system should not be skewed so that, among those landowners, the largest have the greatest vote.

This Court stated in *Reynolds v. Sims, supra:*

> The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.
>
> [Public officials] represent people, not trees or acres. [They] are elected by voters, not farms or cities or economic interests.

377 U.S. at 558, 562.

Appellants, in their effort to retain a preferred class of voters, lose sight of the fact that the District is not owned by its landed residents. It is not a private preserve but a public body. Its owners are "we the people"-landowners and nonlandowners alike. And all those people who dwell within its boundaries who meet the basic qualifications of age, residence, and citizenship have a right under the Fourteenth Amendment of the United States Constitution to participate in the election by which the Directors of *their* District are chosen.

CONCLUSION

The organizations which join in this brief represent a cross section of the community with diverse interests in environmental safety, public health, water and energy conservation, watershed management and flood control, wildlife and natural resource preservation, human rights, voter education, and the rates, terms, and quality of electric and water service. They share in the belief that all residents of the Salt River District have an equal right under the Constitution to participate in the election of the District Board which makes public policy in those areas and they join in urging this Court to affirm the Court of Appeals decision declaring the present one acre, one vote system unconstitutional.

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